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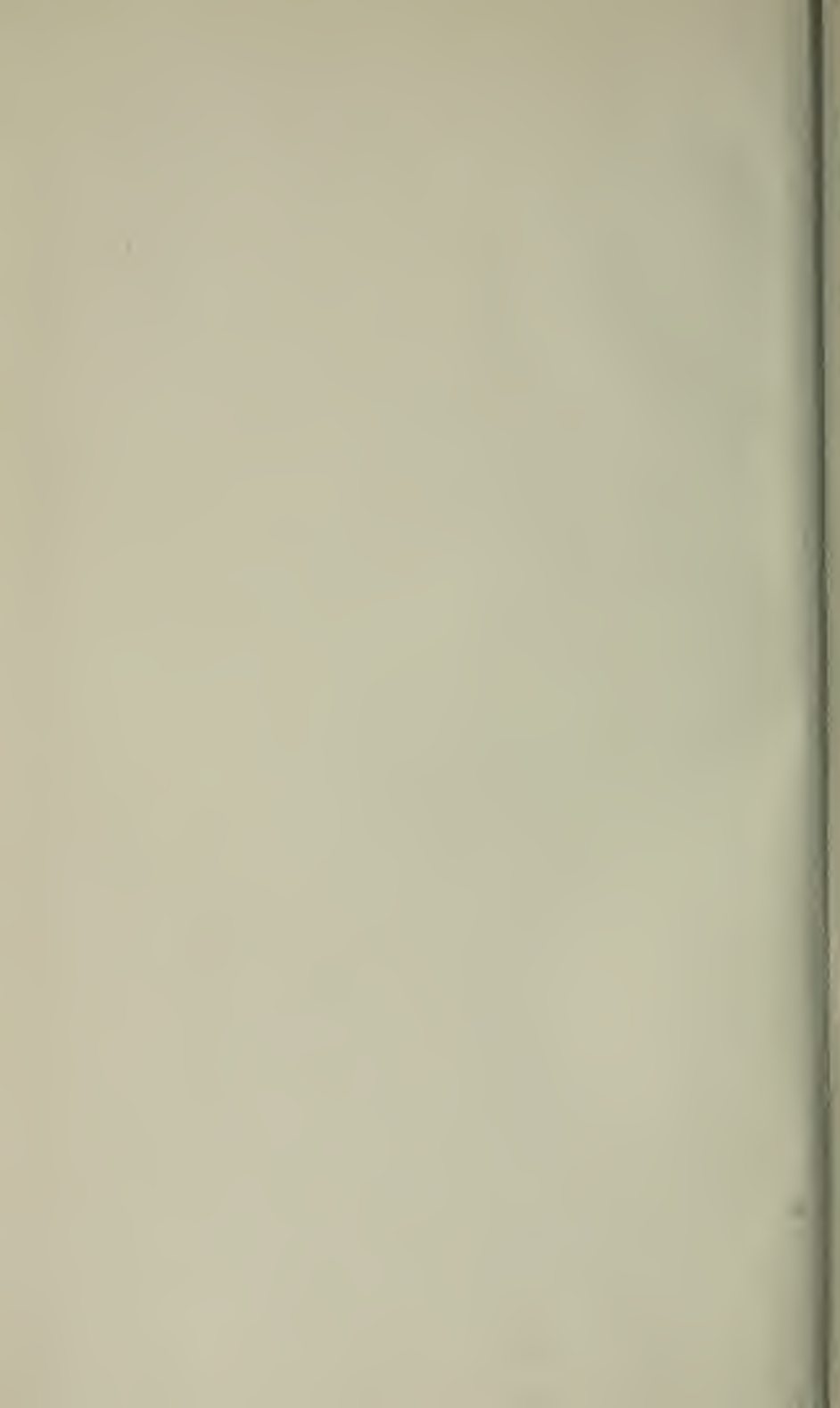
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No. 15834 ✓

United States
Court of Appeals
for the Ninth Circuit

ROBERT AIKEN, L. A. WOLLAM, BERNARD
W. ANDERSON and LLOYD CAMPBELL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana

FILED

FEB 13 1958

PAUL P. O'BRIEN, CLERK

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Designation of Record on Appeal (DC).....	63
Adoption of (USCA).....	254
Findings of Fact and Conclusions of Law.....	52
Judgment	57
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	60
Notice of Entry of Judgment.....	59
Statement of Points on Appeal (DC).....	61
Adoption of (USCA).....	254
Transcript of Proceedings and Testimony.....	65

Witnesses for Plaintiff:

Anspach, Paul G.

—direct	68, 88
—cross	99, 115
—redirect	134, 146
—recross	144, 147

Kuka, Frank

—direct	147
—cross	151

Spencer, Charles S.

—direct	159
—cross	165

Stout, Mark W.

—direct	84
---------------	----

Transcript of Proceedings—(Continued):

Witnesses for Defendants:

Aiken, Robert

—direct 226, 232

—cross 227, 243

—redirect 251

Campbell, Lloyd

—direct 214, 229

Henneman, Henry L.

—direct 173, 191

—cross 194

—redirect 197, 225

Kuka, Frank

—direct 198

—cross 203

Parlemee, Clarence

—direct 205

—cross 212

—redirect 214

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In the United States District Court for the District
of Montana, Great Falls Division

No. 1409

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT AIKEN, L. A. WOLLAM, BERNARD
W. ANDERSON and LLOYD CAMPBELL,
Defendants.

COMPLAINT

Plaintiff for a first cause of action complains
and alleges:

I.

This Court has jurisdiction of this action by reason of the fact that plaintiff is the United States of America.

II.

The plaintiff, through the Superintendent of the Blackfeet Indian Reservation and acting for and on behalf of Indian persons of the Blackfeet Indian Reservation to whom allotments of land have been made, the title to which lands by the terms of said allotments are held in trust by plaintiff, under date of February 1, 1944, noticed the sale of farming and grazing leases. A copy of said notice of February 1, 1944, is attached hereto marked "Exhibit A" and by this reference incorporated herein.

III.

That in response to the notice of sale of farming and grazing leases hereinbefore referred to the de-

fendant Robert Aiken under date of February 10, 1944, submitted a bid to the Superintendent of the Blackfeet Indian Agency, a copy of which bid is attached hereto marked "Exhibit B" and made a part hereof; said bid was accepted without condition, and, in accordance with the notice of sale of farming and grazing leases and the bid submitted by the defendant Robert Aiken, and the unconditional acceptance thereof, a farming and grazing lease designated and known as F-629 was entered into with the defendant Robert Aiken, a copy of which is hereto attached and marked "Exhibit C" and by this reference incorporated herein. By said instrument it was provided in part:

"All land to be farmed as irrigated farm land on a crop rotation basis * * * If it is shown to be necessary to practice weed eradication for one year out of five, water charges will not be required for that year if water is not used."

IV.

By the terms of the notice of sale of farming and grazing leases to which the defendant Robert Aiken responded by his bid, and which resulted in the farming and grazing lease herein referred to, it is provided in part as follows:

"Where it is necessary to practice weed eradication by summer fallow, the lessee may do so, and there will be no charge for water. But this elimination of water charge may be for one year, only, out of five. * * * Dry land farming

is prohibited in this area and the water rental is payable in advance.”

and in the lease the following provision was inserted by typewriter:

“this rotation must consist of at least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown in time to permit sufficient growth for winter cover. No lands will be allowed to remain fallow over the winter.”

V.

The defendants L. A. Wollam and Bernard W. Anderson at the time of the execution of the lease entered into with the defendant Robert Aiken executed in writing a bond for a good and valuable consideration whereby they became sureties of said lessee, the defendant Robert Aiken, as more fully appears from “Exhibit C” hereto attached and made a part hereof.

VI.

The lands leased as above described were, as the defendants well knew, designated as a part of the Blackfeet Indian Irrigation Project, and irrigable therefrom through its system of canals and ditches serving the same. By the terms of the said notice of sale of farming and grazing leases, and the bid of defendant Robert Aiken in response thereto and conditioned thereon, and the acceptance thereof by the Superintendent of the Blackfeet Indian Reservation, particularly the words “Dry land farming

is prohibited in this area and the water rental is payable in advance", together with the context, it was understood and agreed between the lessors of said lands and the defendants that the defendant Robert Aiken would pay annually in advance of each irrigation season occurring during the term of said lease, all operation and maintenance assessments which should accrue against said lands pursuant to existing or future orders of the Secretary of the Interior.

In the drafting and writing of said lease (Exhibit C) by the mutual mistake and inadvertence of the parties thereto, the said understanding and agreement on the part of the defendant Robert Aiken to pay said operation and maintenance assessments was omitted therefrom, and in said respect the said contract of lease was at variance with the true agreement and meeting of the minds of the parties; and the plaintiff claims the benefit of sections 17-901 and 17-903 of the Revised Codes of Montana of 1947, and alleges that in justice and equity the said lease should be reformed and revised to express the promise and agreement of the defendant Robert Aiken to pay said assessments as herein alleged.

VII.

During the term of said lease hereinbefore referred to, water charges for the years 1945 to 1948 inclusive were assessed against the leased land in the sum of \$2722.50, which said charges were regularly assessed by the plaintiff and in accordance with the duly promulgated regulations of the De-

partment of the Interior, an agency and department of the plaintiff; and demand for payment of said sum was made, and has repeatedly been made, upon the defendants Robert Aiken, L. A. Wollam and Bernard W. Anderson, all of whom have failed, neglected and refused to pay the same or any part thereof; and pursuant to applicable regulations interest and penalties in the sum of \$784.99 accrued to May 31, 1952, have been assessed for non-payment of said sum making a total indebtedness due and owing to plaintiff as of May 31, 1952, the sum of \$3507.49, and interest and penalty continues to accrue at the rate of $\frac{1}{2}$ of 1% on the 1st day of each month until paid.

For a Further and Second Cause of Action, Plaintiff Complains and Alleges:

I.

This Court has jurisdiction of this action by reason of the fact that plaintiff is the United States of America.

II.

The defendant Robert Aiken on or about the 14th day of March, 1946, entered into a farming and grazing lease with George Blair, an Indian person enrolled upon the Blackfeet Indian Reservation, for the lease of certain lands described in said lease, and which lands are allotments made to said George Blair; the title to which is in the plaintiff in trust for George Blair. A copy of said lease designated and known as F-761 is attached hereto marked "Exhibit D" and by this reference made a part hereof.

III.

The defendants Lloyd Campbell and Bernard W. Anderson, at the time of the execution of said lease, and for a good and valuable consideration, became sureties for the defendant Robert Aiken; all of which more fully appears in "Exhibit D" hereto attached and made a part hereof.

IV.

By the terms of said farming and grazing lease the said defendant Robert Aiken and his sureties hereinbefore referred to were required to pay operation and maintenance assessments as made. Said lease provides in part as follows:

"It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties, accruing against the above-described land under irrigation, pursuant to the existing or future orders of the Secretary of the Interior (Title 25-Indians, CFR, part 130)."

During the term of said lease there were assessed operation and maintenance charges upon said leased lands by the plaintiff acting through the Department of the Interior, an agency and department of the plaintiff, the sum of \$370.00 for the years 1947 to 1950 inclusive; and demand for payment of said sum was made, and has repeatedly been made, upon the defendants, Robert Aiken, Bernard W. Anderson and Lloyd Campbell, all of whom have failed,

neglected and refused to pay the same or any part thereof; and pursuant to applicable regulations interest and penalties in the sum of \$64.74 accrued to May 31, 1952, have been assessed for non-payment of said sum making a total indebtedness due and owing to plaintiff as of May 31, 1952, in the sum of \$434.74, and interest and penalty continues to accrue at the rate of $\frac{1}{2}$ of 1% on the 1st day of each month until paid.

Wherefore, plaintiff prays judgment against the defendants as follows:

1. That lease known as F-629, referred to in plaintiff's first cause of action, be revised as alleged and set forth in paragraph V of plaintiff's first cause of action.

2. Against the defendants Robert Aiken, L. A. Wollam and Bernard W. Anderson for the sum of \$3507.49, together with interest and penalties accruing at the rate of $\frac{1}{2}$ of 1% per month from May 31, 1952, on \$2722.50 to the date of entry of judgment herein.

3. Against the defendants Robert Aiken, Bernard W. Anderson and Lloyd Campbell for the sum of \$434.74, together with interest and penalties accruing at the rate of $\frac{1}{2}$ of 1% per month from May 31, 1952, on \$370.00 to the date of entry of judgment herein.

4. For plaintiff's costs and disbursements herein incurred.

5. For such other and further relief as to the Court may seem just and equitable.

DALTON PIERSON,

United States Attorney for the
District of Montana.

/s/ EMMETT C. ANGLAND,

Assistant United States Attorney
for the District of Montana.

(Copy)

EXHIBIT "A"

SALE OF FARMING AND GRAZING LEASES

Blackfeet Indian Agency

Browning, Montana,

February 1, 1944

Sealed bids for farming and grazing leases on Blackfeet Indian land described herein will be received at this office until 2 o'clock p.m. February 21, 1944. A minimum price of \$1.25 per acre, per year, for farm land, and 15 cents for grazing, have been fixed, and bids below that price will not be considered.

The leases for grazing, unless connected with a farm lease, will expire April 30, 1946. Except as noted, farm leases will be for the period ending December 31, 1948. Where an allotment contains both farming and grazing land it is intended that the farming and grazing land be leased to the same person and that the farming period govern the date of expiration, unless otherwise shown. Land in the dry land area must be farmed by the strip method and any new dry land broken must be

stripped the third year and thereafter. Strips are to be 15 rods in width and it is expected that the lessee comply otherwise with the requirements of the AAA.

Where water for irrigation is available, lands generally may be farmed and bids will be considered on a farming basis on sod land, including those listed herein as grazing; provided, of course, the soil is what might be expected to be productive.

In the irrigable area, at least one year of the five must be allotted to the use of a legume such as alfalfa or sweet clover. Where it is necessary to practice weed eradication by summerfallow, the lessee may do so, and there will be no charge for water. But this elimination of water charge may be for one year, only, out of five. This summerfallow year may be the one allotted to the legume after the same has been plowed under. Where summerfallow is practiced it will be necessary for a cover crop to be sown in ample time to reach a protective growth for winter, as no land in the irrigable area is to lie fallow during the winter months. Dry land farming is prohibited in this area and the water rental is payable in advance.

Bids are invited on a yearly basis, per acre, with no deduction for stripping or summerfallow. A limited number of crop share bids will be considered, but cash bids are preferred. Where crop shares are desired, the bidder should submit an alternate cash bid. In the case of crop shares, a report must be made within thirty days after harvest showing the amounts and kinds of all crops grown. The lessee

is not to purchase nor grant advances to the lessors on the crops. Crop leases, generally, will provide for delivery of the crop at the market or elevator.

On tracts marked "hay" and other grazing tracts known to produce hay, bids are requested for grazing, and a separate one for the hay. If the owner accepts the hay bid, the rental and hay will be combined in the lease. It is expected that the lessee will not graze the marked hay areas until after the closing of the haying season, but the hay should be taken care of so that grazing may be resumed by September first.

Rentals for the first period of the lease are payable at the time of the approval of the lease. The next cash rental for farm leases falls due on December 1, 1944, and on each following first day of December. Rentals for strictly grazing leases are to be made annually on the first day of May.

Indians who are equipped and financially able to use land upon which they bid, will be first given preference. Otherwise, present lessee who are by their record considered satisfactory, may have the privilege of meeting the high bid on leases that have recently expired or are about to expire.

A satisfactory bond will be required. This may be in the form of two responsible freeholders, a surety company or by depositing in advance the rental for the last year of the lease.

Draft, certified or cashier's check, for at least ten per cent of the yearly rental should accompany the bid. This remittance should be made to the Treasurer of the United States. The remainder of the

first rental payment must be paid at the time of the approval of the lease. A lease fee based on the amount of rental is required. Where the entire rental does not exceed five hundred dollars the fee is not more than five dollars; for each additional five hundred dollars of rental, or fractional part thereof, an additional dollar is required. This fee will be called for when the lease is sent the lessee for signature and is not required with the bid.

The right is reserved to reject any and all bids. Remittances of rejected and low bidders will be returned. But where awards are made and the bidder fails to complete the lease through no fault of the Indian or this office, ten per cent of the amount bid will be forfeited for the use of the Indian owner.

Bids should be addressed to the Superintendent of the Blackfeet Agency, and should be marked on the outside of the envelope: Bid on Farming and Grazing Leases. For further information call upon or write the undersigned.

Sincerely yours,

/s/ F. H. McBRIDE,

F. H. McBride,

Superintendent.

All. No.	Allottee	Description	Sec.	Twp.	Rge.	Use
655	William Gobert	NE/4 NW/4	25	31	6	Farming
3044	Annie Last Star	NW/4 SW/4	25	31	6	20 Farming
2572	Alice Gambler	NW/4 SE/4	25	31	6	Farming
522	Albert Racine	NE/4 SW/4	25	31	6	34 Farming 6 Grazing
2859	Edward G. Doublerunner	NW/4 NE/4	25	31	6	33 Farming 7 Grazing

All. No.	Allottee	Description	Sec.	Twp.	Rge.	Use
2777	Henry Burd	Lot 1	25	31	6	30 Farming (27.02 (Grazing
3045	Florence Last Star	NE/4 SE/4	26	31	6	25 Farming 15 Grazing
2337	George Blair	NE/2 SE/4	30	31	5	Farming
2217	Minnie Foundagun	NE/2	30	31	5	Farming
1937	Margaret Nequette	NE/4 SW/4	30	31	5	Farming
(Description of other allotments omitted as irrelevant.)						

(Copy)

EXHIBIT "B"

Williams, Mont.

Feb. 10, 1944

Superintendent of Blackfeet Agency

Browning, Mont.

Dear Sir;

I would like to place my bid on the following lands;

655	William Gobert	NE/4 NW/4	25	31	6	\$ 50.00	yr.
3044	Annie Last Star	NW/4 SW/4				28.00	"
2572	Alice Gambler	NW/4 SE/4				50.00	"
522	Albert Racine	NE/4 SW/4				43.40	"
2859	Edward G.						
	Doublerunner	NW/4 NE/4				42.30	"
2777	Henry Bird	Lot 1				41.55	"
3045	Florence Last Star	NE/4 SE/4	26	31	6	33.50	"
2337	George Blair	N/2 SE/4	30	31	5	100.00	"
2217	Minnie Foundagun	N/2				400.00	"
1937	Margaret Nequette	NE/4 SW/4				50.00	"
						<u>838.75</u>	

Enclosed find check for \$85.00 to cover 10% of the bid.

Yours truly,

Robert Aiken.

Note: Cashier's check 26245 Great Falls Nat'l Bank
\$85.00.

EXHIBIT "C"

Department of the Interior
Office of Indian Affairs

FARMING AND GRAZING LEASE

Fee \$12.00.

Cont. X-5-Ind.—9435 Lease No. F-629. Tribe: Blackfeet. Allotment Nos. 655, 3044, 522, 2777, 3045, 2337, 2217, 1937.

This Contract, in quadruplicate, made and entered into this 1st day of January, 1944, by and between the Indian or Indians named below (the Superintendent of the Indian Agency acting for and on behalf of minors, undetermined heirs, noncompetents and nonresidents) hereinafter called the "lessor".

Lessors: (see attached schedule)
and Robert Aiken of Williams, State of Montana, Rural Route No. hereinafter called the "lessee", under and in accordance with the provisions of existing law and the regulations prescribed by the Secretary of the Interior relative to Farming and Grazing leases on restricted Indian lands, Witnesseth: That for and in consideration of the rents, covenants, and agreements hereinafter provided for, the lessor doth hereby let and lease unto the lessee the land and premises described as follows, to wit: (See schedule) of Sec., Twp. R. West, containing 697.02 acres, more or less for the term of five years, beginning on the first day of January, 1944, fully to be completed and ended on

the 31st day of December, 1948, subject to the conditions hereinafter set forth. The lessee, in consideration of the foregoing, covenants and agrees to pay the officer in charge of the Indian agency \$788.75 per annum for the use and benefit of the lessor, as rental for the land and premises, said sum to be paid in semiannual payments as stated below.

Date due: Upon approval of lease \$788.75; December 1, 1944, \$788.75; December 1, 1945, \$788.75; December 1, 1946, \$788.75; December 1, 1947, \$788.75.

All land to be farmed as irrigated farm land on a crop rotation basis. This rotation must consist of at least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown in time to permit sufficient growth for winter cover. No lands will be allowed to remain fallow over the winter. If it is shown to be necessary to practice weed eradication for one year only out of 5, water charges will not be required for that year if water is not used.

1. Interest. It is understood and agreed by and between the parties hereto that if any installment of rental is not paid within thirty days after becoming due that interest at the rate of . . . per cent per annum will become due and payable from date rental became due and will run until said rental is paid.

2. Improvements to Be Placed.—It is expressly understood and agreed by and between the parties hereto that the lessee will at his own expense, within . . . from the beginning of

this lease build, construct, and * * * all of which are to be constructed in a substantial and workmanlike manner and of durable material within the time limit specified above, or he shall be liable for the full value thereof, with a fifteen per cent penalty additional for improvements not made as above set forth.

3. Improvements Which May Be Removed.—It is further agreed by and between the parties hereto that the lessee may place the following improvements on the land covered by this lease and remove same within thirty days after the termination of his occupancy; Provided, that he may not attach such improvements to any improvements already on the land or to permanent improvements to be hereafter constructed, in such a way that the removal thereof would in any way damage the improvements which must be left on the land.

4. Improvements Which May Not Be Removed.—It is further understood and agreed by and between the parties hereto that any and all improvements placed upon the leased premises not stipulated in this lease contract are to remain thereon at the expiration of the lease term and become the property of the lessor.

5. Insurance. — It is further understood and agreed by and between the parties hereto that the lessee is.....to insure buildings now on the leased premises or hereafter placed thereon, which are in physical condition to insure, against loss by fire, lightning, windstorm and tornadoes in the full insurance value thereof, for the use and benefit of

the lessor, in a company acceptable to the officer in charge of the Agency, and will keep such insurance in force during the full term of this lease; the insurance money, in the event of loss, to be paid to the said officer in charge, for the use and benefit of the lessor; provided, however, that the lessee may rebuild the improvements within ninety days after the loss to the satisfaction and acceptance of said officer in charge, and in such case receive the insurance money in reimbursement of the expense incurred. The option of the lessee so to rebuild must be declared to said officer in charge within thirty days after the date of the loss; in the event that the lessee does not exercise the option hereunder, it is agreed that said improvements may be rebuilt therewith in the discretion of the said officer in charge. In event the buildings are in physical condition to insure but on account of their not being occupied no insurance company will write a policy, it is understood and agreed by and between the parties hereto that the lessee is to be responsible to the said officer in charge for the full value thereof, and that in event of loss he will pay to the said officer in charge the full amount of the damages, for the use and benefit of the lessor; provided, that said lessee may rebuild or repair the destroyed or damaged buildings under the same conditions as hereinbefore provided for destroyed or damaged buildings which had been insured. It is further understood and agreed by and between the parties hereto that the lessee must within fifteen days after the beginning of this lease file with the officer in

charge of the Agency a proper insurance policy or a statement by some reputable insurance agent that the buildings are not in physical condition to insure; and it is further understood and agreed by and between the parties hereto that the failure of the lessee to file said policy or statement will forever bar him from claiming that the buildings are not in physical condition to insure and will render him liable to the said officer in charge, for the use and benefit of the lessor, for the full amount of any loss, of or to said buildings. It is further understood by and between the parties hereto that in the event of the loss or damage of any buildings which have not been insured and for which the lessee has not filed the above indicated statement that said buildings were not in physical condition to insure, that the officer in charge of the Indian Agency is to appraise the amount of the loss and his appraisal is to be accepted as the true amount of the damage which the lessee is to pay. Where the word "not" is inserted in the first line of this paragraph this clause does not apply.

6. Repairs.—It is understood and agreed by and between the parties hereto that the lessee is to keep the premises covered by this lease in good repair, and the said lessee will be responsible for all damages done to buildings and fences and other improvements, except the usual wear and decay.

7. Manner of Cultivation, Noxious Weeds, Johnson Grass, Etc.—It is understood and agreed by and between the parties hereto that the lessee is to cultivate, improve, and farm the lands covered by

this lease in a husbandlike manner to the best advantage; that he is to commit no waste thereon; that he is to keep said lands free from noxious weeds; and that he is to keep down all Johnson grass that may appear on the leased premises during the term of this lease and to use diligence in an effort to destroy same.

8. Crop Leases.—It is understood and agreed by and between the parties hereto that the lessee will not purchase or be a party to the purchase by anyone, of the lessor's share of the crop, prior to its delivery as hereinbefore provided, and that should he purchase the crops after that time, he will pay the regular commercial price in effect on date of such purchase; that the lessor will not mortgage or otherwise encumber or dispose of his share of the crop prior to its delivery by the lessee as hereinbefore provided for; and that the lessee will harvest crops as soon as possible after maturity in order that the lessor may pasture the land or sow it to wheat. It is further understood and agreed by and between the parties hereto that a strictly crop lease gives the lessee no rights whatsoever in or to any land not cultivated; in or to any pasture on the land; building on the premises; unless specifically stated.

It is further agreed and understood that the shares in a crop rental shall be as follows: One-fourth of cotton, when hand picked, one-third for snapped picked cotton, and two-fifths for sledded cotton, for the lessor's share. All cotton to be delivered at the gin, and money representing the les-

sor's part to be paid to the disbursing officer. If the lessor, or lessors, fail to receive the lessor's part of grain at the threshing machine, the lessee may market such grain and have a fair allowance for hauling such grain from the machine to market, all weights and bills to be presented to the farmer or agency office for final settlement. This division of crops and the handling of same shall govern unless otherwise specified in paragraph No. 2.

9. Stalk Fields.—It is understood and agreed by and between the parties hereto that stalk fields upon the leased premises shall not be sold unless the same will be consumed without injury to the land and prior to the expiration of this lease; and that no cattle or other stock are to be placed upon the stalk fields in wet weather and that the lessee and his sureties shall be liable to the United States, for the use and benefit of the lessor, for any and all damages resulting to the land in violation of this provision of the lease contract. (This paragraph does not apply to ordinary crop leases as, under paragraph 7 above, the lessee has no rights to such stalk fields.)

10. Overpasturing—Stock Laws—Fertilizers. — It is understood and agreed by and between the parties hereto that the lessee will not pasture on the leased premises an unreasonable number of animals for the grass and pasture afforded; that he will observe all quarantine and other stock laws and regulations now in force or hereafter promulgated by the United States or the State authorities; and that all manure and other fertilizer which may be

produced upon the leased premises shall be the property of the lessor and shall be distributed upon the leased lands.

10A. Terracing.—It is understood and agreed by and between the parties hereto that the lessee will terrace and keep up the terrace on.....acres of land covered by this lease at an estimated cost of \$.....; and it is further understood and agreed that the lessee shall do the terracing in accordance with the methods used by the State Agricultural College of the State in which the land covered by this lease is located. In Oklahoma Revised Circular No. 218, Series 56, 1928, the subsequent instructions issued by the Cooperative Extension Work in the Oklahoma Agricultural and Mechanical College, located at Stillwater, Okla., shall be followed.

11. Subleasing—Illegal Assignments—Transfers.—It is understood and agreed by and between the parties hereto that any sublease, assignment, or transfer of this lease or of any interest therein can lawfully be made only with the consent of the lessor in writing and the approval of the representative of the U. S. Government by whom this lease is approved, or his successor in office, and that any assignment, sublease, or transfer made or attempted without such consent and approval shall be void and render this contract subject to cancellation by such officer. It is further understood and agreed by and between the parties hereto that the lessee hereto will be guilty of unlawful subleasing if he contracts, without the consent of the lessor, and

the approval of the officer in charge of the Indian agency, in writing, with any other person or persons to farm or use the premises, or any part thereof, on any other basis than the payment by said lessee of so much money per hour, per day, per week, per month, or per job. It is further understood and agreed by and between the parties hereto that all share cropping or releasing for cash, all or any part of the premises, by the lessee herein, without the consent in writing of the lessor and the written approval of the officer in charge of the Indian agency, except as provided in paragraph numbered 8, hereinbefore, is unlawful subleasing and renders this lease subject to cancellation by said officer in charge of the Indian agency.

12. Timber.—It is understood and agreed by and between the parties hereto that the lessee herein may utilize as fire wood, for his own use only, such dead and down timber as there may be on the leased premises which is not required by the lessor for his own, individual use; that no green timber may be cut by either the lessor or lessee without written consent of the officer in charge of the Indian agency, except that the lessee may cut posts for repairing fences on the leased premises only. (See paragraph 13 prohibiting the lessee cutting posts where a cash allowance is made in the lease contract.)

13. Posts.—Where a cash consideration is allowed for posts, it is understood and agreed by and between the parties hereto that metal, yellow pine, bois d'arc, post oak, or white oak posts are

to be furnished unless otherwise stipulated in paragraph No. 2. The kind of posts to be furnished is to be stated in the blank space in paragraph No. 2 and if it be either of the five kinds named in this paragraph, the specifications are to be as follows: Metal posts must be steel line posts, 6 feet in height, weight not less than $8\frac{1}{2}$ pounds finished with a heavy coat of special steel paint, to be set in the ground two feet and no more than 20 feet apart, corner and gate posts well braced, must be not less than $7\frac{1}{2}$ feet in length, weight not less than 20 pounds, gauge No. 8, and must be set in the ground $3\frac{1}{2}$ feet. Bois d'arc No. 1 select, white oak No. 1 select, post oak No. 1 select or Southern Yellow pine to be 6 to $6\frac{1}{2}$ feet in length and 4 to 5 inches in diameter at the top, placed not less than 2 feet in the ground, set in a true line, well tamped, not farther than 20 feet apart, corner and gate posts are to be 8 feet in length, not less than 8 inches in diameter at the top, placed $3\frac{1}{2}$ feet in the ground, fence to be well braced at the corners and gates. The Southern Yellow pine posts must be pressure treated with No. 1 grade English creosote oil. (Where a money consideration is allowed, and where other than either of the five kinds of posts named in this paragraph are agreed upon, such posts must be stipulated in writing in paragraph No. 2 with special specifications required to fulfill the contract.)

14. Nuts and Fruits. — It is understood and agreed by and between the parties hereto that the lessor reserves all uncultivated nuts such as pecans,

walnuts, etc., berries and other wild fruits, except a reasonable amount for the personal use of the lessee and his immediate family unless otherwise provided in the lease.

15. *Prairie Dogs.*—It is understood and agreed by and between the parties hereto that the lessee herein must kill all prairie dogs on the leased premises within six months after the beginning of this lease and must thereafter, during the term of this lease, keep the premises free from prairie dogs. It is further agreed by and between the parties hereto that failure on the part of said lessee to comply with requirement relative to killing prairie dogs shall render this lease subject to cancellation and the lessee hereto liable for liquidated damages in the amount of \$50, in the option of the officer in charge of the Indian agency.

16. *Business Leases.*—It is understood and agreed by and between the parties hereto that the lessor reserves the right to make a business lease on the premises covered by this lease and that in event such a lease is made, the lessee hereunder shall be entitled to actual damages sustained by him on account of said business lease, and to nothing more. It is further understood that in the event a dispute between the lessee hereunder and the lessee under the business lease as to the amount of such actual damages the matter will be referred to the officer in charge of the Indian agency, who shall be the sole and final judge as to the amount of the said damages.

17. *Introduction and Manufacture of Intoxicants*

—Unlawful Conduct.—It is understood and agreed by and between the parties hereto that the lessee will not use or permit the premises covered by this lease to be used for any unlawful conduct or purpose whatsoever; that he will not use or permit the use of the leased premises, or any part thereof, for the manufacture, sale, gift, or storage of any intoxicating liquors or beverages and that he will not permit the introduction of same into or upon the leased premises; and, that any violation of this provision by the lessee, or with his knowledge, shall render this lease subject to cancellation by the officer in charge of the Indian reservation.

18. Delinquencies.—It is understood and agreed by and between the parties hereto that if the lessee hereto shall fail to pay the rents when due, or to construct or place the improvements on said land as contracted for and in the manner herein provided, or shall fail to comply with or shall violate any of the provisions of this contract, the lessor, or the officer in charge of the Indian reservation, may declare the lease forfeited by giving notice as required by law, and may thereupon re-enter and take possession of the leased premises, and eject the lessee therefrom, and this lease shall thereupon be subject to cancellation by the officer in charge of the Indian reservation, but such forfeiture shall not release the lessee from paying all rents contracted for or from damages for such failure or violation; and it is further understood and agreed that there shall be a lien upon all crops grown or raised upon the leased premises as a security for

the payment of the rents and the making of the improvements provided for herein.

19. *Delivery of Premises.*—It is understood and agreed by and between the parties hereto that at the expiration of the time mentioned in this lease the lessee shall peaceably and without legal process, deliver up the possession of the premises herein described in as good condition as they now are, usual wear and unavoidable accidents excepted.

20. *Upon Whom Binding.*—It is understood and agreed by and between the parties hereto that the covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, assigns, executors, and administrators of the parties to this lease.

21. *Must Be Approved.*—It is understood and agreed by and between the parties hereto that this lease shall be valid and binding only after approval by the officer in charge of the.....
Indian Agency.

22. *Surrender Clause Permitting Seeding Fall Small Grain.*—It is understood and agreed that the lessee will surrender, without cost, the stubble land and other land in suitable condition on which he has no growing crop, to be seeded to fall grain or alfalfa five months prior to the expiration of the lease, when the lease expires at the close of the calendar year; or, prior to the expiration of the year when the lease expires on or before April 1st of the following calendar year.

23. *Interest of Member of Congress.*—No Member of, or Delegate to Congress, or Resident Com-

missioner shall be admitted to any share or part of this contract, or to any benefit that may arise herefrom, but this provision shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

In Witness Whereof, the lessee hereunto has affixed his hand and seal and the lessor hereunto has caused to be attached his legal acceptance on which he has affixed his hand and seal, the day and year first above written.

/s/ ROBERT AIKEN,
Robert Aiken,
Lessee.

Two witnesses to each signature: L. A. Wollam,
P. O. Williams, Mont. Robert Burgess, P. O.
Valier, Mont.

State of Montana, County of Pondera—ss.

I, Robert Aiken, lessee herein, being first duly sworn, depose and say that I am leasing the lands herein described for my own use and benefit, and not, either directly or indirectly, for the use or benefit of any other person or corporation; that I have no agreement, arrangement, or understanding with any person, persons, or corporation whereby said lands or any part thereof shall or may be used, enjoyed or occupied by or for the benefit of any person, persons, or corporation other than myself; and that I have not paid and will not pay any monetary, or other consideration, directly or indirectly, to the lessor for the use of the property

herein described, except as specifically provided for by the terms hereof.

I hereby acknowledge the signing and sealing of this lease to be my free act and deed. .

/s/ ROBERT AIKEN.

Subscribed and sworn to before me at Valier, Mont., this 27th day of May, 1946.

[Seal] /s/ HARRY KING,
Notary Public. My commission expires May 6, 1948.

Bond

In consideration of the letting of the premises described in the foregoing indenture of lease, and of the sum of \$1 to each of us in hand paid, the receipt whereof is hereby acknowledged, we, the undersigned, Lloyd Campbell, of Rural Route No. 1, Pondera County, and Bernard W. Anderson, of Rural Route No. 1, Pondera County, hereby become sureties for the punctual payment of all rents and performance of all the covenants and agreements in the above indenture of lease, to be paid and performed by Robert Aiken, the lessee named therein, and if any default shall be made therein we do hereby promise and agree to pay on demand unto the above-named officer such sum or sums of money as will be sufficient to make up such deficiency, with a 15 percent penalty additional for improvements not made, and fully satisfy all the conditions, covenants, and agreements contained in said indenture of lease without requiring any notice of nonpayment or proof of demand being made. It is agreed that this bond shall be liable for material

furnished under the contract provided such material is of the kind and quality called for under this contract. And we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and sealed this 27th day of May, 1946.

[Seal] /s/ LLOYD CAMPBELL.

[Seal] /s/ BERNARD W. ANDERSON.

Witnesses:

 /s/ A. O. HAMMER.

 /s/ HARRY KING.

Verification of Sureties

State of Montana, County of Pondera—ss.

Lloyd Campbell and Bernard W. Anderson, the sureties to the foregoing indenture of lease, being duly sworn and severally examined by me, state that they signed the foregoing obligations as the sureties for the lessee under the annexed lease, and that they and each of them, respectively, own and possess property over and above all debts, liabilities, and legal exemptions of the value and worth the sum placed opposite their names.

 /s/ LLOYD CAMPBELL,

 /s/ BERNARD W. ANDERSON.

Subscribed and sworn to before me, at Valier, Mont., this 27th day of May, 1946.

[Seal] /s/ HARRY KING,

Notary Public. My commission expires May 6th, 1948.

Recommended for approval.

/s/ [Illegible.]

Agric. Exten. Agent.

Department of the Interior, United States Indian
Service, July 11, 1946.

The within lease is hereby approved and declared
to be made in accordance with the law and the
rules and regulations prescribed by the Secretary
of the Interior thereunder, and now in force.

/s/ F. H. McBRIDE,

F. H. McBride,

United States Indian Superin-
tendent.

EXHIBIT "D"

Department of the Interior
Office of Indian Affairs

Lease No. F-761
Blackfeet Indian Agency Contract No.....

FARMING AND GRAZING LEASE

Tribe: Blackfeet Allotment No. 2337

This Contract, in quadruplicate, made and en-
tered into this 14th day of March, 1946, by and
between the Indian or Indians named below (the
Superintendent of the Indian Agency acting for
and on behalf of Indians non compos mentis,
minors, undetermined heirs, and nonresidents whose
whereabouts are unknown), hereinafter called the
"lessor,"

B-105—George Blair, 80 Acres farming at \$1.25 per acre per yr.—\$127.84; 185.60 Acres grazing at 15c per acre per yr.; Total, \$127.84; and Robert Aiken of Valier, State of Montana, Rural Route No....., hereinafter called the “lessee,” under and in accordance with the provisions of existing law and the regulations prescribed by the Secretary of the Interior relative to Farming and Grazing Leases on restricted Indian lands, Witnesseth: That for and in consideration of the rents, covenants, and agreements herein after provided for, the lessor doth hereby let and lease unto the lessee the land and premises described as follows, to wit: Lots 7, 8, N/2 SW/4, SW/4 SW/4 Sec. 29; S/2 SE/4 of Sec. 30, Twp. 31, R. 5 West, containing 265.60 acres, more or less, of which not to exceed 80 acres may be cultivated, for the term of 41½ years, beginning on the first day of May, 1946, fully to be completed and ended on the 31st day of December, 1950, subject to the conditions hereinafter set forth. The lessee, in consideration of the foregoing, covenants and agrees to pay to the officer in charge of the Indian Agency \$127.84 per annum for the use and benefit of the lessor, as rental for the land and premises, said sum to be paid in semiannual payments as stated below. If this lease covers land within an irrigation project, the lessee is also obligated to pay in addition to the rental the irrigation charges as provided for in section 6, in accordance with the leasing regulations (Title 25—Indians, CFR, Part 171, as amended).

Date Due: On approval \$127.84; Dec. 1, 1946,

\$127.84; Dec. 1, 1947, \$127.84; Dec. 1, 1948, \$127.84; Dec. 1, 1949, \$127.84.

All land to be farmed as irrigated farm land on a crop rotation basis. This land must consist of at least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown by August 20th in time to permit sufficient growth for winter cover. All farm lands to be farmed in a husbandlike manner on a crop rotation basis, with at least one leguminous crop on all five-year leases. No land to remain fallow over the winter. Irrigation water assessment to be paid at same time rental is paid.

Amount of Bond \$. Lease Fee: \$6.00.

[Paragraphs Nos. 1, 2, 3, 4, 5 are practically the same as in Lease F-629 set out at pages 16-19 except in 1.—Interest—no amount is inserted.]

6. Operation and Maintenance.—It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties, accruing against the above-described land under irrigation, pursuant to the existing or future orders of the Secretary of the Interior (Title 25—Indians, CFR, part 130).

7. Repairs and Maintenance.—It is understood and agreed that the lessee is to keep the premises covered by this lease in good repair, and the said lessee will be responsible for all damages done to buildings and fences and other improvements, ex-

cept the usual wear and decay, to clean out old ditches and construct such new ditches and laterals as may be necessary for the economical use of water appurtenant to the land, and keep such ditches and laterals free from willows, shrubbery, and wild grasses; to repair and keep in order all head gates, checks, drops, culverts, dams, flumes, and other structures necessary and maintained for the conveyance and control of water; to make beneficial use of all water appurtenant to said land, and to guard against excessive use of water or the swamping of said land through leakage or seepage, as provided by irrigation regulations (Title 25—Indians, CFR, Subchapter L).

[Paragraphs 8 through 24 are practically the same as paragraphs 7 through 23 of Lease F-629 as set out at pages 19-28.]

/s/ ROBERT AIKEN,

Robert Aiken,

Lessee.

/s/ GEORGE BLAIR,

George Blair,

Lessor.

Two witnesses to each signature: Harry King, Valier, Mont.; A. O. Hammer, Valier, Mont.; Rose Farrell, 315 So. K St., Tacoma, Wn.; W. M. Roberts, 614½ So. 18th St., Tacoma, Wash.

State of Montana, County of Pondera—ss.

I, Robert Aiken, lessee herein, being first duly sworn, depose and say that I am leasing the lands herein described for my own use and benefit, and

not, either directly or indirectly, for the use or benefit of any other person or corporation; that I have no agreement, arrangement, or understanding with any person, persons, or corporation whereby the said lands or any part thereof shall or may be used, enjoyed or occupied by or for the benefit of any person, persons, or corporation other than myself; and that I have only.....acres (andacres) of land leased from Indians for farming purposes, including the land herein described. (The filling in of the number of acres is very material and must hereafter be done in every case. In event there is only one lessee he should fill in the blank space for number of acres which is not in parenthesis. In event there are two lessees the first named herein should fill in the first blank space and the second should fill in the blank space in parenthesis. In event there are two lessees to this lease only one-half the acreage covered by this lease should be added to the acreage already leased by each lessee.)

I hereby acknowledge the signing and sealing of this lease to be my free act and deed.

/s/ ROBERT AIKEN.

Subscribed and sworn to before me, at Valier, Mont., this 19th day of June, 1944.

[Seal] /s/ ROBERT BURGESS,
Notary Public. My commission expires October 26,
1945.

Bond

In consideration of the letting of the premises described in the foregoing indenture of lease, and

of the sum of one dollar to each of us in hand paid, the receipt whereof is hereby acknowledged, we, the undersigned, L. A. Wollam of Williams, Pondera County, Mont., and Bernard W. Anderson of Williams, Pondera County, Mont., hereby become sureties for the punctual payment of all rents and performance of all the covenants and agreements in the above indenture of lease, to be paid and performed by Robert Aiken, the lessee named therein, and if any default shall be made therein we do hereby promise and agree to pay on demand unto the above-named officer such sum or sums of money as will be sufficient to make up such deficiency, with a 15 per cent penalty additional for improvements not made, and fully satisfy all the conditions, covenants, and agreements contained in said indenture of lease without requiring any notice of nonpayment or proof of demand being made. It is agreed that this bond shall be liable for material furnished under the contract provided such material is of the kind and quality called for under this contract. And we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

[Seal] /s/ L. A. WOLLAM.

[Seal] /s/ BERNARD W. ANDERSON.

Witnesses: E. H. Windle, Robert Burgess.

Verification of Sureties

State of Montana, County of Pondera—ss.

L. A. Wollam and Bernard W. Anderson, the

sureties to the foregoing indenture of lease, being duly sworn and severally examined by me, state that they signed the foregoing obligations as the sureties for the lessee under the annexed lease, and that they and each of them, respectively, own and possess property over and above all debts, liabilities, and legal exemptions of the value and worth the sum placed opposite their names.

/s/ L. A. WOLLAM \$800

/s/ BERNARD W. ANDERSON \$. . . .

Subscribed and sworn to before me, at Valier, Mont., this 19th day of June, 1944.

[Seal] /s/ ROBERT BURGESS,
Notary Public. My commission expires October 26,
1944.

Recommended for approval:

/s/ A. M. LONGENBAUGH,
Agric. Exten. Agent.

Department of the Interior, United States Indian
Service, June 22, 1944.

The within lease is hereby approved and declared to be made in accordance with the law and the rules and regulations prescribed by the Secretary of the Interior thereunder, and now in force.

/s/ F. H. McBRIDE,
United States Indian Superin-
tendent.

[Endorsed]: Filed August 27, 1952.

[Title of District Court and Cause.]

ANSWER

Come now, the defendants and for their answer to plaintiff's complaint on file herein and to plaintiff's first cause of action deny each and every allegation, matter and thing therein contained except as the same may be herein admitted or qualified.

I.

Admit the allegations of paragraphs I, II, and III.

II.

As to the allegations of paragraph IV, admit that the defendant, Robert Aiken, submitted his bid for the lands in question under the terms of the notice of sale of farming and grazing leases which resulted in the farming and grazing lease referred to. Denies that the rotation of crops as set forth in said lease would include at least one leguminous crop for one season over all the lease, but alleges that the intent of the parties to the said lease was that the said land would be strip-farmed. Defendant further alleges that the land in question was not second class irrigated land but was dry land and which said land could not be farmed by irrigation.

III.

As to the allegations of paragraph V, admits that defendants L. A. Wollam and Bernard A. Anderson at the time of the execution of the lease by the defendant Robert Aiken executed in writing a bond

whereby they became sureties of said lessee, Robert Aiken. But defendants allege that by the terms of said bond no reference was made to operation and maintenance charges and it was intended that such bond would only cover the rentals called for in said lease and therefore said bondsmen are released and discharged from any and all liability under said bond.

IV.

As to the allegations of paragraph VI, denies that the defendants knew that the leased lands in question were designated as a part of the Blackfeet Indian Irrigation Project but alleges that the said lands were always called "Badger-Fisher Irrigation Project" or "District". Denies that the said leased lands were irrigable from the said Blackfeet Indian Irrigation Project through its system of canals and ditches serving the same and alleges that the said leased lands were not capable of irrigation from the system of canals and ditches on the said project and in fact the greater part of said leased lands were not served by adequate or any system of canals and ditches and it would have been impossible due to the location and character of said leased lands to irrigate same.

Defendants further deny that the terms of said notice of sale of farming and grazing leases contained any provisions or terms relating to the fact that dry land farming was prohibited in said area and the defendants further deny any understanding or agreement between the lessors of said lands and the defendants that the defendant Robert Aiken

would pay any water rental in advance of each irrigation season. Defendant Robert Aiken alleges in this respect that if the said water rental was payable in advance that the plaintiff waived this provision and such is unenforceable because of the tolling of the Statute of Limitations and at no time during the term of said lease or until this suit was filed was a demand made on defendants for the payment of any water rental. Defendants further allege that if said land was irrigable that plaintiff would allot said land in forty acre tracts and conversely if said land was not irrigable it would be allotted in 160 or 320 acre tracts. That under the terms of said lease the land was allotted in contiguous tracts containing considerably more acreage than forty acres.

Defendants deny that there was mutual mistake and inadvertence of the parties to said lease in omitting to provide that the defendant Robert Aiken would pay operation and maintenance assessments. That it was not the intent of the parties to include operation and maintenance assessments in said lease as the said land was not capable of being irrigated and in fact the greater portion of said land contained no irrigation ditches or canals. That at the time defendant Robert Aiken entered into said lease he was informed that the said land had been stripped for five years previously and the previous lease on said land provided it was to be farmed as dry land as well as the subsequent lease to defendant Robert Aiken's lease, and it was therefore not the intent of the parties to irrigate said land.

V.

As to the allegations of paragraph VII defendant denies that the sum of \$3,507.49 or any sum whatsoever is due and owing plaintiff and denies that water charges were ever assessed by plaintiff against him and alleges that no demand for payment of any said sum was ever made upon defendants Robert Aiken, L. A. Wollam and Bernard W. Anderson and that all sums due from defendant Robert Aiken to plaintiff have been paid in full and said lease has been fully performed by said defendant Robert Aiken.

Come now, the defendants and for their answer to plaintiff's second cause of action deny each and every allegation, matter and thing therein contained except as the same may be herein admitted or qualified.

I.

Admit the allegations of paragraph I, II and III.

II.

As to the allegations of paragraph IV defendants Lloyd Campbell and Bernard W. Anderson deny that they as sureties were required to pay operation and maintenance assessments or any part thereof and allege in this respect that by the terms of the lease the lessee would pay all operation and maintenance assessments. Defendants further allege that if any operation and maintenance assessments were payable in advance on the due date preceding each irrigation season that plaintiff failed and refused to make any demand whatsoever upon defendants

for the payment of such assessments and made no demand for any such payments until said action was filed. That pursuant to and under the laws of the State of Montana, Section 93-2603, (RCM 1947) it provides that the Statute of Limitations for recovery of rents and profits under a lease shall be the period of eight years. That said action has not been commenced within said period and therefore is barred by the Statute of Limitations. That the United States Code Annotated, Title 25 (Indians) Section 347 provides in part that the Statute of Limitations of the State in which said land is situate shall apply and be a complete defense to such action.

Defendants further deny that the sum of \$434.74 or any sum whatsoever is due, owing and unpaid to said plaintiff.

By Way of Further Answer and for Their First Affirmative Defense Defendants Allege as Follows:

I.

That the defendant Robert Aiken entered into a farming and grazing lease with the United States Government to lease certain Indian lands, titles to which lands are held in trust by plaintiff and which said lease is dated January 1, 1944 and numbered F-629. That by the terms of said lease it stated that such land was to be farmed as irrigated farm land on a crop rotation basis. That it was not the intent of the parties thereto that such land be farmed as irrigated farm land nor that operation and maintenance charges be assessed against defendants and

therefore no mention or provision was inserted therein in respect to operation and maintenance charges.

II.

That if any operation and maintenance charges were due the same would have accrued prior to the date of August 27, 1952 which date said plaintiff filed suit against said defendants. That any such charges or assessments which had accrued were payable in advance on the due date preceding each irrigation season. That no due date was mentioned in said lease. That if any irrigation and maintenance charges became due, the first installment of which would become due prior to the 1944 irrigation season, which was the first year of said lease.

III.

The defendants have not paid any said assessments during the year 1944 or preceding the said irrigation season during 1944, nor have the said defendants paid or agreed to pay any such assessments to date.

IV.

That Title 25 (Indians) of the United States Code Annotated, Section 347 provides in effect as follows:

“In all actions brought in any state court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee for the possession of rents or profits

on lands patented in severalty to the members of any tribe of Indians * * * the Statutes of Limitations of the states in which said land is situate shall be held to apply and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the Statutes of said states the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians”.

That the said land in question had been allotted and patented to the Indian persons of the Black-foot Indian Reservation. That said patents were held in trust for the allottees by the United States Government.

Under and by virtue of the aforesaid quoted portions from the United States Code Annotated, the Statutes of Limitations for the State of Montana apply to said action. Section 93-2603, Revised Codes of Montana, 1947, provides that the Statutes of Limitations shall be eight years upon

“an action upon any contract, obligation or liability founded upon an instrument in writing”.

That the said period of limitation of eight years has expired from the due date of the first installment of any operation and maintenance charges which may have been assessed or become due under and by virtue of said lease. That plaintiff is therefore barred under and by virtue of said statutes from bringing any action against said defendants.

For Further Answer and by Way of Second Affirmative Defense Defendants Allege as Follows:

I.

That on or about the first day of January 1944 and the 14th day of March, 1946, the defendant Robert Aiken entered into certain farming and grazing leases with the Blackfeet Indian Tribe through the United States Department of the Interior and which said leases were designated as F-629 and F-761 respectively. That said lease F-629 provides among other things for an annual rental in the amount of \$788.75 and said lease number F-761 provides among other things for an annual rental of \$127.84.

II.

That said defendant Robert Aiken entered into possession of said leased lands under and by virtue of said leases and farmed said lands on a dry land basis. That said lands were not capable of or suited to irrigation. That in fact the majority of said lands did not have any irrigation facilities whatsoever and it would have been impossible for said defendant Robert Aiken to irrigate said lands if it were necessary.

III.

That said defendant Robert Aiken has paid in full the annual rentals provided for in said leases and has fully and completely performed all the terms and conditions thereof.

Wherefore, having fully answered the allegations

of plaintiff's complaint herein the defendants pray that the action may be dismissed and that they go hence with their costs.

/s/ C. W. MURCH,
/s/ J. J. WUERTHNER,
/s/ JOHN P. WUERTHNER,
Attorneys for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: November 7, 1952.

[Title of District Court and Cause.]

DECISION

This is a civil action brought by the plaintiff to recover an alleged indebtedness due the United States under Contracts of Lease of Indian lands, entered into by plaintiff with defendant Aiken, with the other defendants as sureties, wherein the former was required to pay a specified annual rental, and also other charges, comprising the main issue herein.

The lands leased by the defendant were situated within the Blackfeet Indian Reservation, in the State of Montana, and within the Blackfeet Indian Irrigation project. There are two leases of land within the said irrigation project, in question here, the title to which is in the United States in trust for the Indian allottees.

A basic regulation of which the defendant was charged with knowledge, is referred to as 25 C F R 171.26, promulgated by the Secretary of the Inte-

rior, May 2, 1942, and published 7 F. R. 3958, reading as follows: "171.26, Leases or Permits, irrigable lands. Leases and Permits of restricted allotted or tribal Indian lands within an irrigation project shall require the lessee, or permittee, to pay on the due date annually in advance during the term of the instrument, and in amounts determined by orders of the Secretary of the Interior, the operation and maintenance charges, including penalties assessed against the irrigable acreage of the lease or permit, and the irrigation charge shall be in addition to the rental payments prescribed in the lease or permit. All payments of such irrigation charges and penalties shall be made to the Superintendent or other designated officer". This regulation was in force in 1944 when the first lease was made, and in substance is still in effect as 25 C F R 171.12.

The form of lease for leasing of Indian lands used in the 1946 lease, contained the following language: "6. Operation and Maintenance: It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties accruing against the above described land under irrigation, pursuant to existing or future orders of the Secretary of the Interior (Title 25 Indians, C F R, part 130)."

Plaintiff contends, against the denial of defendant, that the 1944 lease does provide for payment of the irrigation charges as disclosed by the terms of the lease itself, read in connection with advertisement for bids and defendant's acceptance

thereof. Notwithstanding the omission of the above quoted paragraph. Wording of the lease shows that it is made: "Under and in accordance with the provisions of existing law, and the regulations prescribed by the Secretary of the Interior relative to farming and grazing leases on restricted Indian lands".

The advertisement (Exhibit A) is entitled "Sale of Farming and Grazing leases, Blackfeet Indian Agency, Browning, Montana, February 1, 1944". It called for sealed bids for farming and grazing leases on Blackfeet Indian land "described herein". There was a fixed minimum price of \$1.25 per acre, per year, for farm land, and Fifteen Cents for grazing. Sealed bids were sought for farming and grazing leases on Blackfeet Indian land in both the "dry land area" and the "irrigable area". In the irrigable area, which would include lands under the irrigation project, at least one year in five must be allotted to the use of a legume such as alfalfa or sweet clover. Where necessary to practice weed eradication by summer fallow, the lessee may do so and there will be no charge for water. But this waiver of water charge may be for one year only out of five. Where summer fallow is practiced it will be necessary for a cover crop to be sown in ample time to reach a protective growth for winter, as no land in the irrigable area is to lie fallow during the winter months. Dry land farming is prohibited in this area, and the water rental is payable in advance.

The advertisement seems to make it plain to the

bidder for a lease of Indian lands, what he may expect when he leases land in the dry land area of the Reservation, and what liability he will incur if he leases land in the irrigable area. He leased land in the irrigable area under the Blackfeet Irrigation Project.

The Court has read over carefully both the leases in question in this case, and the language therein contained in connection with defendant's written application for leases under this project, in answer to advertisement for bids, seems to present a valid contract between the parties.

The case cited by plaintiff of *McDonald v. McNinch* (Mont.) 206, p. 1096, seems to bear some resemblance to the situation presented in the present case. It is clearly expressed that defendant under both leases was required to farm the lands as irrigated lands on a crop rotation basis; in other words, that an irrigated farm operation was required of defendant.

In the advertisement for bids heretofore referred to, which was accepted by defendant, the fourth paragraph therein is particularly applicable.

"In the irrigable area * * * dry land farming is prohibited in this area, and the water rental is payable in advance."

As set forth in the brief: "Under date of February 10, 1944, as shown by Exhibit B of the Complaint, Aiken submitted the bid by which he unconditionally accepted all the stipulations and conditions of the advertisement, necessarily including the provision just quoted. This bid was unconditionally

accepted by the Superintendent and the lessors. Execution of the formal lease of 1944 was the result of this offer and acceptance, and was obviously intended to formulate the conditions thus agreed upon. All these documents were contemporaneous, and the Montana Supreme Court has many times held that the entirety must be construed together. Citing *Lyon v. Daily Copper Co.*, 126 P. Mont. 931, and five other Montana authorities and also citing *Doheny v. U. S. F. & G. Co.*, 34 F. Supp. 888 (Mont.), holding that all instruments involved in a transaction, done at the same time, concerning the same subject matter, are to be read together as one instrument, which case was affirmed in 123 F. (2) 746. The Superintendent of the Reservation was required to comply with the provisions of C F R 171.26, and not execute a lease which did not require the payment of operation and maintenance charges under the irrigation project. (Blackfeet Irrigation Project, Title C F R, Sec. 91.1 et seq.)

There seems to be no question that this irrigation project contained a system of canals and irrigation ditches for the use of lessees under the project, and for the use of this defendant under his leases, and while there is conflict in the testimony as to the feasibility of irrigating some of this leased land, as it appears to the Court from the evidence, irrigation facilities were available to lessee.

The defendant entered into the first lease in 1944, and the second lease in 1946, knowing about the character of the soil, the nature and extent of the irrigation system, and the existing conditions, and

the regulations governing the use of lands under the project, and knowing that dry land farming was prohibited, and also knowing that operation and maintenance charges were required to be paid by leaseholders under the irrigation project; the fact that he did not pay these charges in advance as required may have been due to neglect of the officer, whose duty it was to collect such charges when they became due.

Counsel for defendant has presented an able argument in behalf of his client, and if it should ultimately appear that this Court is in error, relief will readily be obtainable. It seems to be the main contention that the irrigation project consisted of a "dry land area" and an "irrigable area", without reference to the Reservation at large, and that in the area occupied by defendant, he was not required to pay a water rental charge, and that he could carry on dry land farming operations at will, but this does not seem to be the reasonable or proper construction of the statutes, regulations and documentary evidence presented in the case, and the testimony given does not change the situation. However, it does seem to the Court that a serious oversight or neglect has taken place for which the Government agents were responsible, and which might lead the defendant to believe that no water charges would be made, after so many years had elapsed before a demand for payment, which was due at the beginning of the irrigation season.

However, after a review of the facts—the lease, the advertisement, the bid, the prohibition against dry land farming, the requirement that water

charges must be paid, the leasing of lands under an irrigation project supplied with canals and ditches, defendant's familiarity with existing conditions, the Court feels obliged to hold, under all the evidence, that defendant must have been fully aware of the extent of his liability under those two contracts of lease of irrigable Indian lands, although the Superintendent of the reservation, or some one qualified to act in his behalf, may have been negligent in not collecting these charges when they were due and payable under the contracts. This does not appear to afford any valid reason for depriving the Government and the Indian allottees of collecting the indebtedness due under the leases. Accordingly, in the Court's opinion, the material allegations of the Complaint having been established by competent proof, judgment should now be awarded plaintiff, and such is the decision of the Court herein. Findings of Fact, and Conclusions of Law, and form of Judgment may be submitted. Exceptions allowed Counsel.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed September 4, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial on the 18th day of January, 1956, and after the introduction of evidence having been submitted to the Court for consideration and decision, upon briefs

to be filed by the respective parties, and the law and the evidence and the said briefs having been duly considered, the Court now makes and files its Findings of Fact and Conclusions of Law as follows, to wit:

Findings of Fact

1.

The Court finds as a fact that all of the lands involved in the issues of this cause are and were at all times in the ownership of the United States of America in trust for certain Indians of the Blackfeet Indian Reservation and under the supervision and administration of the Department of the Interior of the United States. All of said lands are and at all times were included within the Blackfeet Indian Irrigation Project, an agency of the United States of America operated by authority of the Secretary of the Department of the Interior of the United States.

2.

On or about February 1, 1944, the defendant, Robert Aiken, as principal, and the defendants L. A. Wollam and Bernard W. Anderson, as sureties, signed, made and delivered a contract in writing duly approved by the Superintendent of the Blackfeet Indian Reservation for the lease to the said Robert Aiken of certain lands. The document marked Exhibit A and attached to the complaint is a full, true and correct copy of said contract.

3.

By the said contract and agreement, the defend-

ant, Robert Aiken as principal, and the defendants, L. A. Wollam and Bernard W. Anderson, as sureties, did covenant and agree to pay to the plaintiff all operation and maintenance assessments which should be levied against the lands described in said lease and within the Blackfeet Irrigation Project of the Bureau of Indian Affairs, annually in advance on the due date preceding each irrigation season during said lease, including any penalties accruing against the above-described land, pursuant to the existing or future orders of the Secretary of the Department of the Interior.

4.

During the term of said lease hereinbefore referred to, water charges for the years 1945 to 1948 inclusive were assessed against the leased land in the sum of \$2,722.50, which said charges were regularly assessed by the plaintiff and in accordance with the duly promulgated regulations of the Department of the Interior, an agency and department of the plaintiff; and demand for payment of said sum was made, and has repeatedly been made, upon the defendants, Robert Aiken, L. A. Wollam and Bernard W. Anderson, all of whom have failed, neglected and refused to pay the same or any part thereof; and pursuant to applicable regulations interest and penalties in the sum of \$784.99 accrued to May 31, 1952, and have been assessed for non-payment of said sum, making a total indebtedness due and owing to plaintiff as of May 31, 1952, the sum of \$3,507.49, and interest and penalty continues

to accrue at the rate of $\frac{1}{2}$ of 1% on the 1st day of each month until paid. As of October 14, 1957, the date of decision rendered by the Court in this cause, the total sum of principal and interest due, owing and unpaid on the plaintiff's first cause of action is the sum of \$4,385.03.

5.

On or about March 14, 1946, the defendant, Robert Aiken, as principal, and the defendants, Lloyd Campbell and Bernard W. Anderson, as sureties, signed, made and delivered a contract in writing, duly approved by the Superintendent of the Blackfeet Indian Reservation, with the plaintiff for the lease of certain restricted lands of the Blackfeet Indian Reservation described therein, a full, true and correct copy whereof is the Exhibit marked Exhibit D attached to the plaintiff's complaint herein.

6.

By the terms of said farming and grazing lease the said defendant Robert Aiken and his sureties hereinbefore referred to were required to pay operation and maintenance assessments as made. Said lease provides in part as follows:

"It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties, accruing against the above-described land under irrigation, pursuant to the existing or future orders of the Secretary of the Interior (Title 25-Indians, CFR, part 130)."

During the term of said lease there were assessed operation and maintenance charges upon said leased lands by the plaintiff acting through the Department of the Interior, an agency and department of the plaintiff, the sum of \$370.00 for the years 1947 to 1950 inclusive; and demand for payment of said sum was made, and has repeatedly been made, upon the defendants, Robert Aiken, Bernard W. Anderson and Lloyd Campbell, all of whom have failed, neglected and refused to pay the same or any part thereof; and pursuant to applicable regulations interest and penalties in the sum of \$64.74 accrued to May 31, 1952, and have been assessed for non-payment of said sum, making a total indebtedness due and owing to plaintiff as of May 31, 1952, in the sum of \$434.74, and interest and penalty continues to accrue at the rate of $\frac{1}{2}$ of 1% on the 1st day of each month until paid.

Conclusion of Law No. 1

The Court concludes from the aforesaid Findings of Fact, from the minutes of the Court, and from the record herein, that plaintiff is entitled to recover, upon its first cause of action, judgment against the defendants, Robert Aiken, L. A. Wolam and Bernard W. Anderson, the sum of \$4,385.03, together with interest on the judgment to be entered herein as by law provided.

Conclusion of Law No. 2

The Court concludes from the aforesaid Findings of Fact, from the minutes of the Court, and from

the record herein, that plaintiff is entitled to recover, upon its second cause of action, judgment against the defendants, Robert Aiken, Bernard W. Anderson and Lloyd Campbell, the sum of \$553.95, together with interest on the judgment to be entered herein as by law provided.

Conclusion of Law No. 3

Plaintiff is entitled to recover judgment as set forth in the foregoing Findings of Fact and Conclusions of Law, with interest as by law provided, and for the costs of this action to be taxed in accordance with the rules of this Court.

/s/ CHARLES N. PRAY,
District Judge.

[Endorsed]: Filed Oct. 31, 1957.

In the District Court of the United States, District
of Montana, Great Falls Division

Civil No. 1409

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROBERT AIKEN, L. A. WOLLAM, BERNARD
W. ANDERSON, and LLOYD CAMPBELL,
Defendants.

JUDGMENT

Be It Remembered that the above-entitled cause came on for trial on the 18th day of January, 1956, at the court room of said Court at Great Falls,

Montana, before the Honorable Charles N. Pray, the Judge of said Court, sitting without a jury; plaintiff being represented by Krest Cyr, United States Attorney for the District of Montana, Dale F. Galles, Assistant United States Attorney, and Harlow Pease, of the Office of the Field Solicitor, Department of the Interior; and defendants being represented by Julius J. Wuerthner and John P. Wuerthner, Esqs., of Great Falls, Montana. The parties hereto, by their attorneys of record, announced that they were ready for trial. Evidence in behalf of the respective parties was introduced and both parties having rested the Court took said cause under advisement upon briefs to be thereafter filed by the respective parties. All briefs having been filed, and the Court having duly considered the evidence and the law applicable thereto, did on the 4th day of September, 1957, render in writing its decision of said cause. Thereafter the Court made and entered its Findings of Fact and Conclusions of Law which are duly filed in said cause, and incorporated herein by reference.

Now, Therefore, by Reason of the Law and the Premises, It Is Adjudged, that the plaintiff, the United States of America, do have and recover from the defendants, Robert Aiken, L. A. Wollam and Bernard W. Anderson, the sum of \$4,385.03, as provided by Conclusion of Law No. 1 on file herein and that the said plaintiff further recover from the defendants, Robert Aiken, Bernard W. Anderson and Lloyd Campbell, the sum of \$553.95, as pro-

vided by Conclusion of Law No. 2 on file herein; that said sums bear interest from the date of this judgment as by law provided and for the costs of this action.

Done and dated this 31st day of October, 1957.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed, Entered and Noted in Civil Docket Oct. 31, 1957.

Office of the Clerk
United States District Court, District of Montana
Great Falls, Montana

October 31, 1957

To: Mr. Krest Cyr, United States Attorney, Butte, Montana. Mr. Harlow Pease, Office of Field Solicitor, Dept. of Interior, Billings, Montana. Messrs. Wuerthner and Wuerthner, Attorneys at Law, Great Falls, Montana.

Notice is hereby given that in Case Number 1409, United States of America vs. Robert Aiken, et al., a Judgment was filed, entered and docketed in the United States District Court at Great Falls, Montana, on October 31, 1957, as follows: * * * "that the plaintiff, United States of America, do have and recover from the defendants, Robert Aiken, L. A. Wollam and Bernard W. Anderson, the sum of \$4,385.03, as provided by Conclusion of Law No. 1 on file herein and that the said plaintiff further recover from the defendants Robert Aiken, Ber-

nard W. Anderson and Lloyd Campbell, the sum of \$553.95, as provided by Conclusion of Law No. 2 on file herein; that said sums bear interest from the date of this judgment as by law provided and for the costs of this action.”

DEAN O. WOOD,

Clerk,

/s/ By E. C. McKEE,

Deputy.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Robert Aiken, L. A. Wollam, Bernard W. Anderson, and Lloyd Campbell, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that final judgment given, made and entered in this action on the 31st day of October, 1957.

Dated this 22nd day of November, 1957.

WUERTHNER & WUERTHNER,

/s/ By JOHN P. WUERTHNER,

Attorneys for Defendants and
Appellants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 22, 1957.

[Title of District Court and Cause.]

DESIGNATION OF POINTS TO BE
RELIED UPON BY APPELLANT

Whereas, Robert Aiken, the above-named Defendant, is perfecting his appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment made and entered in the above cause on the 31st day of October, 1957, and has served his designation of the portions of the record in said District Court to be transmitted to said Court of Appeals;

Now, Therefore, the above Appellant designates the following points upon which he intends to rely upon said appeal:

1. That said judgment of the District Court is erroneous in that it adjudges that the Plaintiff, the United States of America have and recover from the Defendants, Robert Aiken, L. A. Wollam, and Bernard W. Anderson, the sum of \$4,385.03 as provided by Conclusions of Law No. 1 filed in said cause; and that the said Plaintiff further recover from the Defendants, Robert Aiken, Bernard W. Anderson and Lloyd Campbell, the sum of \$553.95 as provided by Conclusions of Law No. 2 on file herein.

2. That the judgment of said District Court is contrary to the applicable law covering said action and the evidence adduced herein, and to the terminology of the leases in question;

3. That the evidence is insufficient to justify reformation of the lease as set forth in Conclusions of Law No. 1 herein, and the same was contrary to the applicable law covering said action;

4. That the evidence is insufficient to justify the judgment based upon Conclusions of Law No. 2 herein;

5. Upon the evidence the District Court was without jurisdiction to reform the lease referred to in Conclusions of Law No. 1 herein;

6. That the judgment of said District Court if enforced would amount to unjust enrichment of the said Plaintiff at the expense of the Defendants;

7. That the Plaintiff waived its rights to claim operation and maintenance charges by a failure to collect the same either in advance or during the terms of the leases in question;

8. That the said judgment is erroneous in that it varies the terms of the written instrument referred to in Findings of Fact No. 1 herein.

Dated this 9th day of December, 1957.

WUERTHNER & WUERTHNER,
/s/ By JOHN P. WUERTHNER,
Attorneys for Defendant and
Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 9, 1957.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now, the above-named Defendant, by and through his Attorneys of Record, Julius J. Wuerthner and John P. Wuerthner, and designates the following portions of the record herein to be certified to the Clerk of the United States Court of Appeals for the Ninth Circuit, San Francisco, California, and which portions of said record are material to the consideration by the said United States Court of Appeals of the appeal herein, and as such shall be printed by the Clerk of said Court:

1. Judgment roll consisting of the following documents:

Complaint,

Answer,

Opinion by the Hon. Charles N. Pray, Presiding Judge,

Findings of Fact and Conclusions of Law,
Judgment;

2. All original exhibits;

3. Notice of Entry of Judgment;

4. Reporter's transcript of the proceedings herein.

Dated this 22nd day of November, 1957.

WUERTHNER & WUERTHNER,

/s/ By JOHN P. WUERTHNER,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Nov. 22, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers, to wit: Complaint, Answer, Opinion of the Court, Findings of Fact and Conclusions of Law, Judgment, Notice of Appeal, Affidavit of Service, and Designation of Record on Appeal are the originals filed in Case No. 1409, United States of America vs. Robert Aiken, et al., and designated by the parties as the Record on Appeal in said cause; and that annexed hereto is a copy of the notice of entry of judgment given to defendants in the said cause; and I further certify that I transmit herewith as a part of the Record on Appeal the Reporter's Transcript of Evidence filed on November 18, 1957, and the exhibits called for in appellant's Designation, to wit: plaintiff's exhibits Nos. 1, 2, 3, 4, 7, 8, 9, 10, 14 and 15, and defendants' exhibits Nos. 6, 11, 12 and 13.

Witness my hand and the seal of said Court at Great Falls, Montana, this 6th day of December, A. D. 1957.

[Seal] /s/ DEAN O. WOOD,
Clerk as aforesaid.

In the District Court of the United States, in and
for the District of Montana, Great Falls Division

Civil No. 1409

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT AIKEN, et al.,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable Charles N. Pray, United States District Judge, at Great Falls, Montana, on January 18, 1956, 10:00 a.m.

Appearances: Mr. Krest Cyr, United States Attorney, Butte, Montana, Mr. Dale Galles, Assistant United States Attorney, Billings, Montana, for plaintiff. Mr. John Wuerthner, of Wuerthner & Wuerthner, Attorneys at Law, Great Falls, Montana, for defendant. [1]*

Proceedings

The above entitled cause came on regularly for trial before the Honorable Charles N. Pray, United States District Judge, presiding without a jury, at Great Falls, Montana, on January 18th and 19th, 1956; whereupon the following proceedings were had and done, to-wit:

The Court: Gentlemen, are you ready to proceed?

* Page numbers appearing at bottom of page of Original Transcript of Record.

Mr. Cyr: We are ready to proceed.

Mr. Julius Wuerthner: We are ready, your Honor.

The Court: Do you desire to make a brief statement?

Mr. Cyr: Just briefly. I would like to move the name of Harlow Pease be entered as counsel on behalf of the Government also.

The Court: Very well.

Mr. Cyr: Primarily the issue is whether or not the Government is entitled to rentals for operation and maintenance of an irrigation district of land which was owned and leased by Robert Aiken. As an incident of that one of the questions which will arise and has arisen from the pleadings is what the lease meant; there were some omissions from the lease. We think, however, that the matters which have been omitted have been admitted in the pleadings and now resolve that question and there is only the necessity of briefing the matter for the court. Specifically Exhibit A attached to the complaint has been admitted by the defendant; that is the sale of the farming and grazing leases in which [4] it is stated that dry land farming is prohibited in this area and water rent is payable in advance. That is at the end of paragraph 4 of Exhibit A. Pursuant to that the land was leased by Mr. Aiken. The bid was accepted, which is marked Exhibit B and admitted by the defendant. The lease Exhibit C is admitted by the defendant also and we think we have presented all of the questions and the evidence before the court as to

what was meant in the lease. There is in addition the issues admitted in the pretrial conference. Now it appears to be the contention of the defendant from the pleadings the land was not irrigable, that there was no point of delivery on the land, that no assessment was ever made and that there was no notice of the assessment ever delivered to the defendant. Now I think those are the issues of fact which are in the case and we will make our proof on that. There are two leases, the 44 and 46 leases, which are the first and second causes of action respectively.

The Court: As I remember, I glanced at the pleadings the other day and as I recall there was no demand ever made for the payment of those annual assessments until suit was begun?

Mr. Cyr: Well, your Honor, I think in 1948 the proof will show in 48 an assessment was made and copy of that assessment was mailed to Mr. Aiken and notice actually given to him. [5]

The Court: I just happened to pick that up from my memory they contend there was no demand made until you began suit.

Mr. Cyr: Yes.

The Court: Very well, do you defendants desire to make a brief statement of your position?

Mr. John Wuerthner: Your Honor, we would like to reserve our statement at this time.

The Court: Very well.

PAUL G. ANSPACH

was called by plaintiff and having been duly sworn testified as follows:

Direct Examination

Q. (By Mr. Cyr): Would you state your name, please, sir? A. Paul G. Anspach.

Q. What is your occupation?

A. At present I am retired.

Q. What did you do before you retired?

A. I was Project Engineer of the Blackfeet Irrigation Project.

Q. And how long did you occupy that position of Project Engineer?

A. Well the last session up there was from June 1938 until August, 1950. [6]

Q. And you were also Project Engineer prior to that time? A. Yes, from 24 to 33.

Q. What is your profession, Mr. Anspach?

A. Civil Engineer.

Q. And you were at all times as the Project Engineer a Civil Engineer? A. That is right.

Q. I will hand you what has been marked Plaintiff's Exhibit 1 and ask you if you can recognize what is represented on that?

A. Well it represents the two leases of Mr. Aiken on Badger Fisher Unit of the Blackfeet Project.

Q. Can you tell from that—I see part marked in green and part in red—do you know which portion refers to which lease?

A. I know part of the green refers to the 44

(Testimony of Paul G. Anspach.)

lease but I am not familiar with all the descriptions.

Q. And referring to that do you recognize that as a topographical map of the area involved in this case?

A. That is right.

Q. And referring to the red marks which appear on Plaintiff's Exhibit 1, what do those represent?

A. Those represent ditches. [7]

Q. And the heavy blue lines which appear?

A. They are what we call minor laterals.

Q. The red ones are referred to as major laterals?

A. Yes, sir.

Q. And does that fairly and accurately portray the land as situated and the ditches as situated geographically?

A. It does.

Mr. Cyr: We will offer for the purpose of illustration Plaintiff's Exhibit No. 1.

Mr. John Wuerthner: May I briefly question the witness, your Honor?

The Court: Very well.

Q. (By Mr. Wuerthner): Referring to Plaintiff's proposed Exhibit 1 will you tell me who prepared that exhibit?

A. No, I can't tell you who prepared this exhibit because it is prepared from a geological survey map.

Q. Again referring now to the map itself did you prepare it or was it prepared under your direction?

A. No.

Q. Referring to the red lines and the blue lines and the shaded area, was that done by you or under your direction?

A. Neither.

(Testimony of Paul G. Anspach.)

Q. You know nothing about that portion of the exhibit?

A. No, not the exhibit itself. [8]

Mr. Wuerthner: Was this offered in evidence?

Mr. Cyr: It was offered only for the purpose of illustration. We don't contend this has any probative value. It is our position and so the court and counsel will know where the land is located geographically and for the purpose of identifying the location of the ditches and the land that is the purpose.

Q. (By Mr. Wuerthner): May I ask you if you identify the green shaded portion?

A. As I said part of it I know definitely because we had considerable discussion about it and I have had correspondence about it since I left the project. I don't recall exactly these units. I am pretty sure of these but I don't recall those units.

Q. You didn't have anything to do with the shading of the green? A. No.

Q. And you don't know what the green shaded area represents?

A. Not definitely except as I say my correspondence with the area office I know that is north half of section 30 and township 31 north, range 5 West.

The Court: You might find out when was the last time he went over that area and whether he had that map and compared [9] that map with the area or whether he thinks that generally exists.

Q. (By Mr. Wuerthner): Now you have testified this green area has to do with the 44 lease?

(Testimony of Paul G. Anspach.)

A. That is right.

Q. Whose 44 lease?

A. The lease to Mr. Robert Aiken.

Q. Where did you get your information this refers to the 44 lease?

A. I have checked this with the proof maps; our project maps that I have worked over for years.

Q. You have checked and did you do the shading?
A. I did not.

Q. Do you know who did it?

A. (No answer in copy.)

Q. And you have compared this green area with the project map you say?

A. I have compared this map with the project map for ditches and locations to the land.

Q. Did you have anything to do with making up the project map?
A. Yes.

Q. And when was that?

A. The project map was originally made up in 32 and 32 and revised in 41. [10]

Q. What is this map based on?

A. That map is based I believe on an aerial map of that area and the Geological Survey.

Q. And when was that the aerial survey was made?
A. I couldn't tell you.

Q. You don't know?
A. No.

Q. And the survey map has it been revised since 31?

A. 41. It was made in 31 and revised in 41.

Q. And you don't know when this was made from that map?
A. No.

(Testimony of Paul G. Anspach.)

Q. You don't know the date this map was made?

A. No.

Q. Did you ever go over this ground shaded in green? Do you know whether or not the shaded area conforms with the lease you testified with Mr. Aiken?

A. Not over the ground but we have had the description in the project office.

Q. Where did you get the description?

A. From the lease.

Q. And were the descriptions part of the project map? A. They are tabulated.

Q. What do you mean by that?

A. They were tabulated in a schedule of the acreage under lease subject to irrigation. [11]

Q. And where was the schedule prepared?

A. The schedule was prepared in the irrigation project office.

Q. Did you prepare it?

A. I couldn't say that I definitely or whether the clerk did; some the clerk did and some I did.

Q. It was more or less prepared under your supervision?

A. It was. It was generally checked by me.

Q. Now these other marks represented alone where did these come from?

A. Which other lines?

Q. These red and blue lines which appear, where did that information come from.

The Court: I think you had better reserve your further examination until cross examination. I

(Testimony of Paul G. Anspach.)

think this is only for illustrative purposes. The court really wanted to find out how much he did know about it, whether he ever compared that map with any trip he made over the project and over the land involved in the lease.

Mr. Cyr: With that in mind I will withdraw my offer at this time and lay further foundation.

The Court: Very well.

Q. (By Mr. Cyr): During the time you were project engineer did you have occasion to go over all the land which was a part of that project? [12]

A. No.

Q. Did you have occasion to determine whether or not the lands within the project were irrigable or not irrigable? A. Did I have what?

Q. Did you have occasion to determine whether the lands were irrigable or not irrigable within the project? A. Yes.

Q. And specifically did you make a determination of whether or not the lands which were leased by Mr. Aiken were irrigable within the project?

A. Well that is according to what you mean by the word determination. We did determine the irrigable acreage that had been determined by land designation survey and the schedules.

Q. Maybe what I should ask you is what did you do with reference to that land?

A. We determined for the Agency the acreage that was then susceptible or land to which service could be made at the current time.

(Testimony of Paul G. Anspach.)

Q. Now referring you to Plaintiff's Exhibit No 2, do you recognize that?

A. Yes, that is the regular form.

Mr. Wuerthner: Just a minute, I believe the answer to that would call for yes or no. We object to any gratuitous statements. [13]

Q. What is it?

A. Do I recognize it, yes.

Q. What is it?

A. It is a status account in the irrigation project and was to set up and show the irrigable acreage, the current year's charges on each 40 acres or smaller if there was allotted smaller tract under the lease.

Q. What lease?

A. This Robert Aiken lease which was the general rule for all leases.

Q. And what year lease does that refer to?

A. This starts in 44.

Q. Now was that prepared under your supervision and direction while you were project engineer?

A. It was.

Q. And from information gathered by you in the field?

A. And the file and from our office records.

Q. And the land descriptions which appear on there were determined to be the lands included within the lease by you or under your supervision, is that correct?

A. Yes, sir.

Q. Now comparing that with what has been marked as Plaintiff's Exhibit 1 do the markings

(Testimony of Paul G. Anspach.)

on that indicate the portions which have been marked in green therefrom? [14]

A. Well I would have to check it over.

Q. Would you do that please?

A. It conforms with the green shaded area.

Q. It conforms with the green shaded area information, conforms with the description contained in Plaintiff's Exhibit 2? A. Yes.

Q. And you have said that this Plaintiff's Exhibit 2 was prepared under your supervision and direction at the time you were project engineer?

A. It was.

Mr. Cyr: We will offer in evidence Plaintiff's Exhibit 2 and renew our offer as to—well, not yet.

Q. (By Mr. Wuerthner): Referring to Plaintiff's Exhibit 2 I will ask you if this is the original or a copy from the original?

A. Well I would say this is the original.

Q. Are you sure? Can you definitely say whether or not that is the original?

A. No, I don't believe I can definitely say.

Q. If that is not the original do you know where the original is? A. No.

Q. And there are several amounts shown upon here, can you tell us where those amounts came from? [15]

A. Now which amounts do you refer to?

Q. Individual figures?

A. Individual amounts or the total?

Q. I am referring to both, the individual amounts and the totals as shown there.

(Testimony of Paul G. Anspach.)

A. The individual amounts are the current year's O & M charges against the tract of land.

Q. Where did those amounts come from?

A. They come from amounts computed from irrigable acreage on the land setup by the O & M order that come out from the Washington office.

Q. Where is the computation of those amounts?

A. Where is the computation?

Mr. Cyr: We will object to the question as improper on voir dire, your Honor. I don't know where the materiality is where the computation was made. This witness testified it was under his supervision and direction.

The Court: It was made by rates established by the Secretary of the Interior?

Mr. Cyr: Yes but I think he is asking here where the computation was made.

Mr. Wuerthner: Your Honor, I believe our position is whether this is hearsay testimony or whether this is the original. [16]

Mr. Cyr: In that respect we will establish these are part of the official records of the Project. The present Project Engineer is here. We will put that on.

The Court: Very well, there is no need to detail any more of that.

Mr. Wuerthner: I have one more question, your Honor.

The Court: All right.

Q. Can you tell me when this exhibit was made?

A. This exhibit was made in 44 and the figures

(Testimony of Paul G. Anspach.)

set up in type were set up at the time it was made. The figures that are in longhand were set up currently to apply to the current season. There was one of these made for every lease for the full period of the lease and as set up in type and the following information was put on there by longhand as it became current.

Q. And you know of your own knowledge these so-called figures were made up in 44?

A. The typed figures were made up in 44 and the others were made up the current year shown.

Q. And they were made up under your supervision?

A. In this particular case, yes.

Mr. Wuerthner: May it please the court, to the introduction into evidence of Plaintiff's Exhibit 2 the defendant objects on the ground and for the reason that by [17] the witness' own testimony it appears to be hearsay, and that he has testified he is not sure whether it is made from the original or whether this is the original so any testimony in this regard will be hearsay unless further established.

Mr. Cyr: We will withdraw our offer until he testifies.

The Court: Very well.

Q. (By Mr. Cyr): I will show you what has been marked as Plaintiff's Exhibit 3 and ask if you will identify that, please?

A. Well it is another lease that began in 46 to

(Testimony of Paul G. Anspach.)

Mr. Robert Aiken on trust patent land and the schedule set up in the project irrigation office.

Q. What is that? That is not a lease?

A. No, that is a schedule of irrigable lands included within the lease.

Q. 46? A. 46 lease.

Q. Now was that prepared under your direction and supervision? A. It was.

Q. Where you were the Project Engineer?

A. Yes.

Q. Now referring to the descriptions contained in there [18] and portion marked in red on Plaintiff's Exhibit 1, can you identify and conform one with the other?

A. There are two tracts shaded in red that aren't included in the irrigable schedule, presumably they are dryland farms.

Q. That is there are two descriptions in Plaintiff's Exhibit 3 described in Plaintiff's Exhibit 3 which are not contained in Plaintiff's Exhibit 1?

A. No, Plaintiff's Exhibit 3 does not show two tracts that are shaded in red.

Q. And can you mark those two with an X or with the pencil?

A. Well now the others are marked with an X.

Q. Well put a circle around it, please?

A. That is the irrigable part is marked with an X, and this unit here and this unit here are not included as irrigable lands.

A. It would be the northwest of the southeast of section——

(Testimony of Paul G. Anspach.)

Mr. Wuerthner: Your Honor, we are going to object to this testimony on the ground the exhibit speaks for itself.

Mr. Cyr: It is just further foundation really.

The Court: Yes, go ahead and lay your foundation.

A. That is the northwest of the southeast of section 29-31-5, and the southeast of the southwest of section 29-31-5. They are not included in the irrigable schedule. [19]

Q. Which is marked as Plaintiff's Exhibit 3?

A. That is right.

Q. Do you know why those weren't included in Plaintiff's Exhibit 3?

A. They contained no irrigable land.

Q. And I will hand you what has been marked as Plaintiff's Exhibit No. 4 and ask if you can identify that, please?

A. That is the office copy of a statement or memorandum that was mailed to Mr. Robert Aiken of the amount unpaid for irrigation assessments against his lease.

Q. And that was done under your direction and supervision? A. It was.

Q. At the time you were Project Engineer?

A. Project Engineer.

Q. And also done on the date which appears on there?

A. I couldn't remember now whether it was on that date or not.

Q. Can you tell me whether or not there was a

(Testimony of Paul G. Anspach.)

point of delivery on the lands which were leased by Mr. Aiken which are described in what has been marked as Plaintiff's Exhibits 2 and 3?

A. There was.

Mr. Wuerthner: Just a minute, we are going to object to that question on the ground the witness hasn't shown himself qualified to answer the question. He has not [20] physically been over the land and has not positively studied the so-called blue and red marks which appear on that exhibit which is not yet in evidence.

Mr. Cyr: We are not referring to the exhibit, your Honor; we are asking if he knows.

The Court: Perhaps you better lay a foundation on what he knows and how he knows it and whether he has been over the land and examined it physically and that sort of thing.

Q. You have stated you were Project Engineer for what period of time, Mr. Anspach?

A. During this period 38 until 50.

Q. And during that period did you have occasion to go over to the land that was leased by Mr. Aiken which is in issue in this case?

A. I did but it was prior to the time Mr. Aiken leased it, however.

Q. It was prior to the time Mr. Aiken leased it?

A. Yes.

Q. Did you observe or did you have anything to do with the construction of the major lateral ditches to that land?

Mr. Wuerthner: Just a minute. We are going

(Testimony of Paul G. Anspach.)

to object to that; he was on the land prior to this ditch in question and there is no testimony those ditches are the same or different. [21]

The Court: Perhaps if you give him an opportunity, he will do so before he gets through with the examination. Go ahead.

Q. Did you observe any ditches on the land or leading to the land?

A. Yes and I helped survey some of the ditches that are on the land.

Q. Did you assist in the laying out of the location of them and supervised during the time of construction? A. Absolutely.

Q. And was that work on both the major laterals of the project and what is referred to as minor laterals? A. That is right.

Q. Now then for the court describe the difference between a major lateral and a minor lateral?

A. Well a major lateral, what we term a major lateral would carry possibly 25 to 50 second feet of water, which would serve numerous smaller laterals, delivering to the land.

Q. And what would be the minor laterals?

A. The minor laterals would be in the neighborhood of 5 to 10 second feet service to individual tracts.

Q. Do you know whether there were major laterals delivering water to minor laterals on the property which is in question? A. I do. [22]

Mr. Wuerthner: Just a minute, unless the time is fixed, we will object to that question.

(Testimony of Paul G. Anspach.)

The Court: The time of the lease, date of the lease, when was it? When was this examination made?

Mr. Cyr: That is what I am going to ask him. I don't know, he was on the land for years and I don't know when the major laterals were constructed but I am going to go ahead and examine as to that.

The Court: Just find out the date.

Q. What were the dates?

A. The major laterals for the project were surveyed and constructed before I went on the project some place around '16 when the initial major laterals were constructed.

Q. Were they on the land?

A. They were on the land.

Q. And you have personally observed them?

A. A good many times.

Q. Now how about the minor laterals?

A. Some of the minor laterals, they were built at the same time. The minor lateral system has been used from year to year to serve lands as they are put into operation and there are still lots of them to build yet. There are still proposed minor laterals all throughout the project.

Q. Now with reference to the major laterals and minor laterals which serve the lands leased by Mr. Aiken, were they [23] first surveyed and constructed while you were Project Engineer?

A. The extensions as to that particular line was.

(Testimony of Paul G. Anspach.)

Q. And that was at the time Mr. Aiken was leasing the land?

A. They were built prior to that time. They were built prior to 41.

Q. But they were actually physically located and constructed at the time he leased the land?

A. They were.

Q. I will ask you if you know whether or not there was a point of delivery on those minor laterals for delivery of the water to the lands of Mr. Aiken?

A. There was. The laterals were constructed to the land and if the lateral extended, wherever the lateral extended beyond that land there would be headgates to turn out the water.

Q. And was that true in all cases?

A. Only in cases where the lateral is constructed just to that land there wouldn't be a headgate.

Mr. Wuerthner: May it please the court, in order that none of us have been misled, there has been no time fixed for this man's testimony and it has been speculative as far as we are concerned.

The Court: I will overrule your objection; there has been a time laid during the continuance of this [24] lease he testified a few moments ago. Go ahead, Mr. District Attorney.

Q. Where was the point of delivery on the lands here in question, Mr. Anspach?

A. Well there would be several on that. There is no one point of delivery that would serve all of that land because it is more or less rolling land.

(Testimony of Paul G. Anspach.)

There is one definite half section there which has a hogback running from southwest to northeast, and the point of delivery would be on that ridge at the highest point that the ditch could come into it, and that ditch was eventually carried right straight down that ridge to the land shown.

Q. Was that true in all instances, the delivery to the highest place on the land?

A. The highest place the ditch system could reach.

Q. And in this instance were there points of delivery for the delivery of water to all of the lands which have been described and which you have identified in Plaintiff's Exhibits 2 and 3?

A. There are.

Mr. Cyr: Your Honor, we request permission to withdraw this witness for a few moments and put on additional foundation testimony for the offering of these exhibits.

The Court: Very well. [25]

MARK W. STOUT

was called as a witness by plaintiff and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Cyr): Would you state your name, please?

A. Mark W. Stout.

Q. Where do you reside?

A. Browning, Montana.

Q. And what is your occupation and profession, Mr. Stout?

(Testimony of Mark W. Stout.)

A. Project Engineer.

Q. And what project?

A. The Blackfeet Project, Blackfeet Indian Project on the Reservation.

Q. And you have been present while Mr. Anspach testified? A. Yes, sir.

Q. Did you replace him at the time he retired?

A. I started in '50.

Q. And that is the same project which Mr. Anspach has described? A. Yes, sir.

Q. I will hand you what has been marked Plaintiff's Exhibits 2, 3 and 4 and ask you if those are a part of the official records of your office? [26]

A. Yes, sir, they are.

Q. And are you the official custodian of those records? A. Yes, sir.

Mr. Cyr: We offer in evidence Plaintiff's Exhibits 2, 3 and 4.

Mr. Wuerthner: May I ask the witness some questions?

The Court: Yes.

Q. (By Mr. Wuerthner): Mr. Stout, you have testified that you didn't become Project Engineer until '50, is that correct?

A. That is right, sir.

Q. And you knew nothing about the lease in question as it terminated prior to that time, is that correct? A. Yes.

Q. And were these records made under your supervision? A. No.

Q. You were not Project Engineer at the time

(Testimony of Mark W. Stout.)

these records were made? A. No.

Q. And you don't know of your own knowledge about these records?

A. No, sir, as far as the lease is concerned I don't.

Q. And you don't know then whether or not these exhibits are correct?

A. All they are is a record of the office. They are official records. [27]

Q. I see a notation here, June 6, '51, in this file, is that your writing? That is Plaintiff's Exhibits 4 and 3.

A. No, that is not my writing; that is the clerk's writing.

Q. And the clerk made that up? A. Yes.

Q. As far as you know?

A. As far as I know.

Q. And you don't know of course anything that happened in '44 and the years subsequent to that time prior to your employment as Project Engineer?

A. In what respect?

Q. Well you don't know anything about the correctness of those records as you were not Project Engineer when they were made up?

Mr. Cyr: We object to this as improper voir dire; the foundation is laid, and the witness does not know anything about them. He is an official custodian of the official records of the office. That is the only foundation we have used on this witness.

Mr. Wuerthner: Very well, I will withdraw that last question.

(Testimony of Mark W. Stout.)

Q. Do you know whether or not those are original records or copies of the originals?

A. I could not answer that. [28]

Mr. Wuerthner: To the introduction into evidence of Plaintiff's Exhibits 2 and 3 and 4 we will object on the ground no sufficient proper foundation has been laid, and there has been no testimony whether these are originals or copies, and there is further testimony that the witness was not the official custodian of the records at the time they were made up.

Mr. Cyr: Your Honor, under the federal rules they are part of the official records of the Government's officer and who is the official custodian of them. The materiality of the records has been established by Mr. Anspach under whose direction and supervision the records were prepared from personal conduct of the affairs of the office during the time this lease was in effect by Mr. Aiken. We think the foundation has been laid and they are now admissible in evidence for the purpose of establishing that assessment was made of this land and that it was determined water was available to it without exception on the two areas marked by Mr. Anspach. These records are admissible in themselves as official records of the Government and identified.

The Court: Yes, they are official records of the office. I will overrule your objection and they may be admitted in evidence.

Mr. Cyr: That is all. You may step down. Do you have some questions? [29]

Mr. Wuerthner: Will he remain?

Mr. Cyr: Yes.

Mr. Cyr: Do you wish to cross examine him?

Mr. Wuerthner: Not at this time.

Mr. Cyr: Mr. Anspach.

PAUL G. ANSPACH

resumed the stand and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Cyr): Now referring to Plaintiff's Exhibit No. 2 there appears on there certain figures, can you state to the court what those figures represent?

A. The figures represent the irrigation charge for the described unit for each current year. Do you want me to go to any length into it?

Q. Yes. Now would you describe how much was due in each year?

Mr. Wuerthner: We will object to that on the ground the exhibit speaks for itself.

Mr. Cyr: That is fine. I was just going to go through it for the record.

Q. With reference to the figures which appear at the bottom are those the totals of the amounts due? [30]

A. The totals of the amounts due. That is the capital amounts due for each year of the irrigation system.

Q. What do you mean by capital?

(Testimony of Paul G. Anspach.)

A. Well there is no penalty upon that applied; for nonpayment there is a penalty and the statements showed the penalty computed up to a certain time.

Q. I will refer you to the S.F. which appears on the right column of '44, what does that mean, Mr. Anspach?

A. Presumably, I haven't the lease, but the terms of the lease permit him one year on that lease without assessment or construction charges for weed eradication.

Mr. Wuerthner: We move that the latter part of the answer be stricken.

The Court: Well he can just speak of his own knowledge and not from his recollection of the lease.

Mr. Cyr: Your Honor, I believe this language is contained in the pleadings and conceded in the pleadings and further it is an explanation of the meaning——

The Court: What is that?

Mr. Cyr: That it was an offset for this one year. This is to the benefit of the defendant; he was not charged for that year by reason of some weed eradication.

Mr. Wuerthner: That was presumed, he used the word presumably and it is speculation, your Honor.

Mr. Cyr: It is immaterial to us. [31]

The Court: That is what I wanted to know, whether he could be not speculating about it.

Mr. Wuerthner: There's too many of those leases

(Testimony of Paul G. Anspach.)

and I can't recall every lease that people talk about in their testimony.

Q. Do you know what it is?

A. S.F. referred to privilege of summer fallow that year and no charge was made.

Q. S.F.? A. Stands for summer fallow.

Q. You know that of your own knowledge?

A. Yes.

Q. Do you know of your own knowledge that was put on all of these status of water rentals?

A. Wherever provision was made in the lease they would have summer fallow.

Q. You know that of your own knowledge?

A. Yes.

Q. I will ask if any charge was made against Mr. Aiken for the year '44?

A. Not on the '44 lease.

Q. On subsequent years there was a charge made in the amount provided? A. That is right.

Q. Now I will hand you what has been marked [32] Plaintiff's Exhibit 3 and is the same thing true of the S.F. which appears on that?

A. Yes, in 46, which gives the privilege of summer fallowing and no charge.

Q. No charge for the year 46?

A. That is right.

Q. Now I will hand you what has been marked as Plaintiff's Exhibit 4, do you know whether any notice of assessment was mailed to Mr. Aiken prior to that? A. Not to my knowledge.

(Testimony of Paul G. Anspach.)

Q. And you were Project Engineer during all that time prior to that time?

A. The Project did not send out any statements prior to that time. This was a memorandum to Mr. Aiken sent from the Project office. The Agency office was the official billing office.

Q. And what was the reason for that one being mailed out at that time, if you recall?

A. Simply the fact our record showed no payment was made and we were notifying him of that fact.

Mr. Wuerthner: May it please the court, I don't know what he testified regarding. He is testifying regarding a memorandum and some copies. Now we have been served with no subpoena duces tecum to produce the original memorandum and we are wondering now if he is testifying from his copy.

A. That is an office record copy.

Mr. Wuerthner: There has been no demand made for the original, your Honor. And no foundation laid now for any secondary evidence of the contents of that memorandum.

Mr. Cyr: This is a part of the official records of the office, your Honor. It has been admitted in evidence?

The Court: Yes.

Q. (By Mr. Cyr): So, referring again to what has been marked as Defendant's Exhibit No. 1, which you have identified, does that accurately portray the location of the major laterals and minor

(Testimony of Paul G. Anspach.)

laterals in the areas of the lands which were leased by Mr. Aiken? A. Yes.

Q. And I believe you have stated that the portion marked in green represents after comparison with Plaintiff's Exhibit 2 the lands described in Plaintiff's Exhibit 2 as irrigable?

A. Not all of the land shaded is irrigable but the land that is included in the 40 like a point and so on some of those tracts are irrigable which the schedule will show the acreage of each 40 acre tract and the amount which is irrigable.

Q. There is irrigable land in each of those tracts? A. That is right.

Q. And that is the land which is included in the lease [34] which you determined to be susceptible to irrigation? A. That is right.

Q. And the portion of land and the same is true of that with reference to the 46 lease?

A. Yes, sir.

Q. With the exception of the two quarter sections that you said were included in this statement?

A. That is right, contained no irrigable land.

Q. And that was for the reason those two quarter sections contained no irrigable land?

A. That is right.

Mr. Cyr: We renew our offer for the purpose of illustration of Plaintiff's Exhibit No. 1.

The Court: Any objection?

Mr. Wuerthner: Is this for illustrative purposes only?

(Testimony of Paul G. Anspach.)

Mr. Cyr: Yes, that is all.

Mr. Wuerthner: It is my understanding this topographical map does not show the entire position on all of the laterals it shows?

Mr. Cyr: That is correct.

A. That is correct, just that section involved.

Q. (By Mr. Wuerthner): May I inquire if this map does show the boundary of the project for the project this map represents? [35]

A. I don't believe—no—we have a project map here that shows the boundaries of this portion.

Q. You don't know whether or not the boundary is in relation to the certain area?

A. No, it would only be a guess on my part.

Q. What is the date of that map?

A. I do not know, as I said before.

Q. And when were those areas shaded in?

A. I cannot tell you that.

Q. When were those lines colored blue and red?

A. I don't know; I had nothing to do with the map.

Q. Could it have been twenty years ago?

A. No.

Q. Could it have been ten years ago?

A. Yes.

Q. Could it have been last year?

A. Well it could have been last year and it could have been last week as far as that is concerned.

Q. I am referring now to the position or placing

(Testimony of Paul G. Anspach.)

of these various laterals you testified to, when were they inserted?

A. I don't know when this map was made or when these lines were colored in. I know that we had service over to this area in '41.

Q. What do you base that on? [36]

A. Our project maps.

Q. Which are not in evidence yet?

A. Yes, well——

Q. Now may I ask you to what year does this map refer to in the placing of these lateral lines?

A. It would be subsequent to '41. This lateral was not extended through here in '41; it was at this point in '41.

Q. You are referring now to a point which is on the edge of? A. On this high area.

Q. Section 30 in the west edge?

A. Section 30.

Q. Now could those lines or those laterals have been placed after '49?

A. According to this map?

Q. Yes.

A. This extension here could have been placed after that.

Q. Which extension?

A. Over 30 to the land beyond it?

Q. What I am getting at, Mr. Anspach with the map as portraying these various laterals what year does that represent?

A. I don't know. I don't know when this map was made.

(Testimony of Paul G. Anspach.)

Mr. Wuerthner: May it please the court, we will renew our objection to Plaintiff's proposed Exhibit 1 on the [37] ground there has been no sufficient foundation laid. The witness has not placed the time that these various laterals existed and he has not fixed any time at all for the map here shown that they are attempting to introduce into evidence.

The Court: Well if it is introduced for illustrative purposes, it would have to be denominated very general indeed with all these qualifications I am not certain that it would serve any relevant useful purpose with the uncertainty of this witness as to its origin and what it included and when the laterals were put on or when the extensions were made; I will sustain the objection.

Mr. Cyr: I want you to understand we are just offering it for the benefit of counsel and the court in referring to it.

The Court: We will take a recess. (11:00 a.m.)

(Court resumed, pursuant to recess, at 11:15 a.m. at which time all parties and counsel were present.)

Mr. Cyr: Your Honor, if we can have another ten minutes it looks as if we can agree on this Plaintiff's Exhibit 1.

The Court: Very well, we will take ten minutes recess. (11:15 a.m.)

(Court resumed, pursuant to recess, at 11:35 a.m., at which time all parties and counsel were present.)

(Testimony of Paul G. Anspach.)

The Court: Are you ready to proceed? [38]

Mr. Cyr: Your Honor, counsel for the defendant has agreed to stipulate that the Government's Plaintiff's Exhibit 1 may be introduced for illustrative purposes; that the portion marked in green represents the 44 lease, the portion marked in red represents the 46 lease; that the lines in red are the major laterals and that the lines in blue are the minor laterals. Now there is a dispute between us as to the terminus of the minor laterals which we will bring out by testimony, but for the purpose of illustration the defendants also want to stipulate this was on the extreme east end of the project.

Mr. Wuerthner: Does this map show the eastern terminus of the project?

Mr. Cyr: This map does not.

Mr. Wuerthner: There is some more beyond that, is there?

A. It could be shown on that map but it does not; that is the eastern terminus of that particular area of the project.

Mr. Cyr: So immediately to the east of the lands described and marked in red and in green on this map there is no more project; that is the eastern terminus of the project on the east end?

A. I beg your pardon, there is a little bit on there.

Mr. Wuerthner: Why don't you make a red pencil mark [39] on the eastern terminus and I will stipulate?

(Testimony of Paul G. Anspach.)

Q. Well I would have to have the project map to do it from.

Mr. Cyr: And they will further stipulate that the portion which is marked on the extreme east part of the map which would be the right-hand side of Plaintiff's Exhibit 1 which is in green and red pencil and on the bottom of the red portion which has been identified as the 46 lease is this witness' best recollection as to the east boundary of the project, eastern and southeastern.

The Court: Very well, it may be admitted under those conditions.

Q. (By Mr. Cyr): Now referring to Plaintiff's Exhibit 1 can you identify for the court the terminus of the ditches leading to the lands which were leased by the defendant Aiken?

A. They are depicted on here in blue and red circles as the terminus of the minor laterals to the land.

Q. And at what date was that, do you remember?

A. That was in 41.

Q. And so the extension of the ditches beyond what appears in blue and red circles was subsequent to 41?

A. Subsequent to 41.

Q. Do you know when they were made?

A. No. [40]

Q. Now you have reference to the blue portion, now referring to the main lateral, one of which terminates on the land?

A. That is just a question of opinion which is major and which is minor lateral. In that case I

(Testimony of Paul G. Anspach.)

would call it a minor lateral because it terminates right at that point; there is no projected extension beyond.

Q. Now referring to Plaintiff's Exhibit 1 how many ditches either minor major laterals terminated on this land in 41?

A. There was three that terminated on the land.

Q. And were there any that terminated at the edge of the land?

A. Well they all terminated at the edge of the land; one does not quite reach the land.

Q. Would you describe those three now by the terminus, the location of the terminus geographically by section and range if you can?

A. The north one was terminated at the northwest quarter of the northeast quarter of the northwest quarter of section 25-31-6. The next one terminated——

Q. And that is the next one to the south?

A. The next one to the south terminated a little over, a little south of the southwest quarter of the northwest quarter—pardon me that is incorrect—a little south of [41] the southwest quarter of the northwest of the northwest of Section 30-31-5. And the next one to the south terminated in the northwest quarter of the northeast quarter of the southwest quarter of 30-31-5. Then the fourth one terminated about an eighth of a mile west of the southwest corner of the northeast quarter of the southwest quarter of 30-31-5.

Mr. Wuerthner: Would you have the witness

(Testimony of Paul G. Anspach.)

mark those as 1, 2, 3 and 4 for our identification?

Q. As you have identified them would you mark them in the same order in which you have identified them as 1, 2, 3 and 4?

The Court: What identification marks did you put on?

A. Just the figures 1, 2, 3 and 4 in blue pencil.

Q. In the same order?

A. In the same order that I described them.

Q. Now that was the physical location of these ditches at the terminus of these ditches at the time you determined the susceptibility of irrigation to this land, was it? Strike that question; it is kind of difficult. Referring to Plaintiff's Exhibits 2 and 3 the descriptions which are contained in those were made on the basis of the location of the ditches as you have described them as existing in 41?

A. They are.

Mr. Cyr: You may examine. [42]

Cross Examination

Q. (By Mr. Wuerthner): You have stated you were project engineer originally on this project from 24 to 33? A. That is right.

Q. Where were you prior to 24?

A. Well I worked for the Bureau of Reclamation on this same project only on one unit of the project.

Q. Have you had any special training in your capacity as project engineer?

A. Well I don't know, 30 years of it might be.

(Testimony of Paul G. Anspach.)

Q. Does your training consist solely of experience? A. No.

Q. Did you have any formal education to prepare you for this type work?

A. As a Civil Engineer at Ohio Northern University.

Q. You got a degree in civil engineering?

A. Civil Engineer.

Q. Now I believe earlier this morning that you testified that you didn't go over the land personally to determine whether or not it was irrigable?

A. Now I didn't say that; I said I didn't go over the land personally in respect to the boundaries of this lease; I have been over the land many times in the surveys [43] and locations of the ditches.

Q. Do you know whether or not any water was furnished on that land at the time this lease was entered into or during the term of the leases in question?

A. No, there was no water delivered.

Q. No water delivered?

A. No water delivered to it.

Q. Can you tell the court from examination of the Plaintiff's Exhibit 1 the furthest boundaries that the water reached during the term of these leases?

A. It reached to the, that would be the, around the indicated No. 2 lateral at this point here.

Q. Now it is your testimony that there was water? A. Available at that point.

(Testimony of Paul G. Anspach.)

Q. The water was available at point No. 2?

A. Available at point No. 2.

Q. On what do you base that answer?

A. Because we had ditches to it.

Q. Because there were ditches?

A. Because there were ditches to it.

Q. The fact that you have ditches does that indicate the water will reach that point? A. Yes.

Q. In other words, if the ditch is dug the water will flow through the canals to the point you have indicated? [44] A. Yes.

Q. Did you ever follow the water in there to determine whether the water ran to point of service? A. I did not.

Q. Did anybody?

A. I believe Frank Kuka the ditch rider.

Q. And you can testify there was actually water at that last point two?

A. No, I can't personally testify to that.

Q. You are only basing if on the fact there was a ditch there?

A. The ditches were built to it.

Q. Now what have you to say to the ditch terminating with No. 1? A. No. 1 was in.

Q. There was water to that point?

A. To that point.

Q. Have you ever seen water at that point?

A. No; the ditch went to that point.

Q. Can you indicate on that ditch line terminating at No. 1 the furthest point approximately that

(Testimony of Paul G. Anspach.)

you have seen water in your experience as project engineer? A. No, I can't.

Q. You don't know? A. No. [45]

Q. Now, Mr. Anspach, may I ask you if you have seen water in any of the ditches represented on Plaintiff's Exhibit 1?

A. From the boundaries of it, yes.

Q. From the boundaries?

A. That is from the ditches shown on this Exhibit 1 I have seen water in lots of those ditches but I can't tell you which one or at which time.

Q. And you don't know how far or how close to the plaintiff's leased land this water was located that you saw? A. No, sir.

Q. Now on this map there is shown a lateral K, can you say at what point on that lateral that you have seen water in your experience?

A. I can't tell you.

Q. You don't know that? A. No.

Q. Would Mr. Kuka know that?

A. Mr. Kuka would know that.

Q. Now you have testified that the ditch terminating at point 2 was placed there in 41?

A. It was there in 41.

Q. It was there and on what do you base that, a personal observation or on the basis of this map?

A. No, on the basis of official project map; this is [46] not an official project map.

Q. And you base that therefore on the project map? A. That is right.

(Testimony of Paul G. Anspach.)

Q. And that is not yet in evidence, is that correct? A. Yes.

Q. Then so far as your testimony has been to this point it is merely guess work on your part as to the terminus point of these various ditches?

A. On this particular map.

Q. You are basing it only on this Exhibit No. 1?

A. That is right?

Q. And you didn't personally go over the land to determine the terminus points of these ditches, did you? A. No.

Q. Now do you know whether during the term of the defendant's leases, do you know what term those leases were for?

A. They were five year terms starting in 44 and one in 46.

Q. Do you know whether during that 7 years both leases were in operation of any water was in these ditches that you have been testifying about?

A. I don't know how far they were out in the ditches, no, I can't tell you that.

Q. You know there was water in the ditches?

A. There was water in the ditches.

Q. Isn't it part of your job to inspect these ditches? A. No, not necessarily.

Q. What is your job then?

A. My job is to supervise the entire project; there is a crew on each unit which inspects the ditches and maintains the ditches.

Q. Now in your supervision of the project do you ever ride these ditches?

(Testimony of Paul G. Anspach.)

A. What do you mean? I have inspected ditches, yes.

Q. Did you determine whether or not they would hold water?

A. Yes, and I have determined what ditches should be cleaned for a certain season.

Q. Does your office keep a record of the repairs and the ditches when they are dug?

A. Not as far as date is concerned.

Q. Not as far as date?

A. I don't have no definite record, no.

Q. Then you have no record showing the date or dates these ditches were put in as shown by Exhibit 1? A. No.

Q. And you have no record to show what date or dates new ditches are installed?

A. No, the only record would be the engineering survey record. [48]

Q. How often are these ditches repaired?

A. Whenever it is necessary.

Q. And who determines whether it is necessary?

A. The watermaster and his ditch riders.

Q. That is not in your presence then?

A. Not necessarily.

Q. Do you know whether the defendant, Mr. Aiken, has demanded any water during the terms of these leases?

A. Mr. Aiken did not demand water during the terms of these leases.

Q. But in your opinion it was possible to irrigate all of the land involved in these leases?

(Testimony of Paul G. Anspach.)

A. The land that is involved there that is irrigable.

Q. In other words, the land represented by the green shading is susceptible of irrigation?

A. Not all of it.

Q. About what portion is not susceptible?

A. Well I would have to figure up the total area of the tracts. This irrigation schedule Exhibit 2 shows the acreage in each tract, each 40 acre tract the amount of acreage in that tract that is irrigable.

Q. Who determined whether or not the acreage was irrigable?

A. There was a survey of the entire project made in 31 and 32 and set up a designation of every tract within the [49] boundary of the project as to its irrigability and also as to the amount gone out of each tract.

Q. Was that based upon your personal observation?

A. No, that was based upon two survey parties and land designation board setup by the Interior Department.

Q. You had nothing to do with that survey?

A. Nothing to do.

Q. From your examination of Plaintiff's Exhibit 2 can you tell us about what portion in percentage of the ground is not susceptible to irrigation, just an estimate? Would you like to refer to this map to assist you?

A. Well there is about 739 acres in the area.

(Testimony of Paul G. Anspach.)

I believe this is about 10 or more acres over in the 40.

Q. Total acreage?

A. About 730 acres and 605 acres irrigable of it.

Q. Are you any judge whether land is irrigable or not? A. I think so.

Q. Now will you tell the court what in your opinion makes for irrigable land?

A. Land that can be served under a gravity, in this case gravity system where water will flow from a ditch over the land with suitable distribution ditches.

Q. In other words, you submerse the entire area with water?

A. No, I said spread it over. [50]

Q. Spread it over?

A. No, the land is sloped so that it percolates through if it isn't put on in numerous places.

Q. Now do you know the general contour of the land involved here?

A. No, it is too variable.

Q. Is that what you would say is level land in your estimation?

A. No, this land here is inclined to have a pretty good slope to it.

Q. There is a decided slope?

A. There is a slope to the gullys both ways.

Q. And there is a large gully running through this land, is that true? A. Yes.

Q. Now would that have any effect on the irrigability of the land?

(Testimony of Paul G. Anspach.)

A. Certainly; that would be eliminated if it was too steep to hold water.

Q. Now do you know anything about the type soil that is involved on this land?

A. Yes, I know it is very heavy soil.

Q. Very good soil? A. Very heavy soil.

Q. And in your opinion heavy soil is susceptible of [51] irrigation? A. That is right.

Q. And better crops can be raised on heavy irrigated soil than a lighter soil?

A. It is according to who farms it.

Q. Pardon me.

A. It depends on the farmer.

Q. I am trying to get your opinion what you base the irrigable land on?

A. From past records the land irrigated on this particular unit on the Blackfeet Project produced on the average more than land not irrigated.

Q. Now when was the last time that you recall water was used on this land?

A. I don't know.

Q. Was it ever used?

A. I believe according to the ditch riders it was during the term the water users were operating the project.

Q. When was that? A. From 33 to 38.

Q. 33 to 38? A. Five seasons.

Q. And you say then this land was irrigable?

A. It was.

Q. What about after 38? [52]

A. In what respect?

(Testimony of Paul G. Anspach.)

Q. Well why didn't they irrigate after 38 if these crops were raised as you testified to?

A. That was their option.

Q. Pardon? A. That was in their option.

Q. Whose option, the lessee?

A. We couldn't force them to irrigate if they didn't want to.

Q. Well were water charges assessed prior to the time Mr. Aiken had his lease?

A. I don't know whether that land was leased prior to that time. I don't recall who had the land prior to that time.

Q. Do you recall Mr. Aiken leasing this land for the five years immediately preceding 44?

A. No, I don't.

Q. You don't recall that? A. No.

Q. Are you generally aware who is leasing that land?

A. Well I think Mr. Wielswane had it prior to Mr. Aiken but I don't recall when his lease terminated and Mr. Aiken took over.

Q. What I am getting at, Mr. Anspach, why this was assessed, that is water service commencing in 44 and then assess any charges prior to that to Mr. Aiken? [53]

A. Well I don't know that they did not.

Q. You don't know that they didn't assess them?

A. That they did not, no.

Q. Were you acquainted with Mr. Carrs about 1939?

A. Yes.

Q. What was his official capacity?

(Testimony of Paul G. Anspach.)

A. Land agent or land clerk, lease clerk.

Q. Is he living at the present time?

A. I believe some place. I don't know. He is retired back east some place.

Q. Who took his place?

A. I think Stanley R. Pugh.

Q. Are you acquainted with the party that leased this land after Mr. Aiken's lease ran out?

A. Well I believe I was gone when Mr. Aiken's lease ran out.

Q. Let's see, you were there until '50, were you not? A. 50.

Q. Are you acquainted with Mr. Henneman who leased this land in '49?

A. I am acquainted with Mr. Henneman. I have no record of his lease in '49.

Q. When was the last time you looked over this land? A. I couldn't tell you that.

Q. Well was it 10 years ago or 15 years ago?

A. Well it probably was 15 years ago anyhow.

Q. You haven't been over this land for approximately 15 years then?

A. Not to my knowledge.

Q. In other words, since approximately '40 you have not physically been over this land?

A. Not to my knowledge; I couldn't swear to it.

Q. And since '40 you don't know what's happened in regard to the ditches, do you, outside of the records you testified to?

A. And the records to me coming in from the watermaster office on the unit.

(Testimony of Paul G. Anspach.)

Q. Now did you testify on direct examination that you determined the acres susceptible to irrigation? I didn't understand that?

A. No, I didn't determine the acreage. We simply setup the schedule of the irrigable acreage from the land designation board determination. The land board setup by the Interior Department determined the irrigable acres on each unit and we in turn set it up in the schedule of these individual leases as they come to our attention.

Q. Yes, and this amount of acreage irrigable would that mean from the basis of the contour map such as is in evidence here?

A. The contour map and projected lands, surveyed lands. [55]

Q. In other words, you can determine from the project map whether land can be irrigated by a certain system of ditches? A. That is right.

Q. Now referring again to Plaintiff's Exhibit 1 I will ask you if between your numbers on your terminus points 1 and 2 there is a gully?

A. Yes.

Q. And is that a steep gully or is that a gradual slope?

A. I would presume from the width of it it is a steep gully.

Q. And does the land slope towards that gully on either side?

A. The contours would indicate.

Q. Now referring to your point 1 immediately to

(Testimony of Paul G. Anspach.)

the right of that point approximately how far does it show this gully in distance?

A. To the north the gully is about an eighth of a mile, the center of the gully would be about an eighth of a mile.

Q. I am referring to the slope. And southeasterly direction from point 1, is that a graduated slope towards the gully?

A. That topography is not too large a scale to tell but the general run on that one it would be a graduated slope [56] down to the gulley.

Q. Graduated slope. Now referring to the terminus point 2 which you have indicated preceding in a southwesterly direction from that point will you indicate what type of slope toward the gulley toward the north of that there is?

A. Well that should be according to the topography a graduated slope to the northwest.

Q. And would you say the ditches run to point 2 terminus runs alongside of a hill?

A. No, it runs along a ridge.

Q. Along a ridge? A. Yes.

Q. And would it surprise you to know if water was in that ditch that the water would run to the gulley instead of on to the land it was supposed to irrigate?

A. It wouldn't surprise me very much.

Q. It is a possibility?

A. If there is a fill in there and it isn't maintained, it would run over.

Q. But you don't know whether there is?

(Testimony of Paul G. Anspach.)

A. I don't know.

Q. Now I am referring to Plaintiff's Exhibit 4, you have testified that that is a memo sent to Mr. Robert Aiken?

A. That is the office copy of a statement or memo.

Q. It isn't an official bill, it is a memo statement bill [57] for what?

A. Of unpaid irrigation charges.

Q. Where does it show on that exhibit anything to the effect that is an unpaid irrigation charge?

A. Well that is the carbon copy and it hasn't the typed form; it is the office retained copy on a thin sheet, and I believe the forms are in some of the files here.

Q. You don't know though?

A. I do know.

Q. This exhibit itself does not indicate what those charges were made for or that they were even charged, does it?

A. It does not specify on this office retained copy.

Q. Does it indicate Mr. Aiken owes any amount of money there? A. Not on this copy.

Q. They are just some figures appearing?

A. That is right.

Q. Now isn't it a fact, Mr. Aiken wrote to your office after he received that requesting information what those charges were?

A. I can't recall that.

Q. You don't recall that letter?

(Testimony of Paul G. Anspach.)

A. I don't recall.

Q. Could it have been received?

A. It could have. [58]

Q. Would it be in your official files?

A. If it was received.

Q. Could it be in the files produced in court this morning? A. I couldn't say.

Q. Are those the official files kept in your office?

A. That Mr. Stout brought up is official files.

Q. And those were the files maintained under your supervision when you were in the office there?

A. Yes.

Q. And does that file contain everything that pertains to these leases in question? I am referring now to all correspondence.

A. All correspondence should be in the individual file.

Q. And if Mr. Aiken wrote to you that would be in that file? A. It should be in the file.

Q. May I see that file. I am handing you what was formerly identified by you as the official file in your office as pertains to Robert Aiken?

A. I didn't identify this as official file because this was made up after I left there and I don't know whether it was the official file or not.

Q. Did you keep an official file when you were the supervisor? A. Yes. [59]

Q. And is that file here? Do you recognize any of the documents in the file in which you have in your hand?

(Testimony of Paul G. Anspach.)

A. These documents are all subsequent to my leaving the project.

Q. They are? A. Yes.

Q. I see a letter dated January 2, 1948, you were in the office at that time?

A. I was in the office at that time but that, when this file copy was sent to the district office this information was typed on to this standard form in order to retain a record in the project in the event of its being lost.

Mr. Cyr: That is a document January 2, 1948?

A. Yes, but that was in order to send to the district office a copy of all office retained copies in the present files and it isn't the original document here. The rest of these are all——

Q. Filed in which office?

A. With the district office.

Q. You don't show any response to that reply from Mr. Aiken in the file?

A. No, not in that file.

Mr. Cyr: In that regard let the record show we have delivered to the counsel for the defendant all of the files with the project which we have in your possession [60] in our possession containing correspondence with Mr. Aiken.

The Court: I think we had better suspend here.

(12:15 a.m. January 18, 1952, to resume at 2:00 p.m.) [61]

Court resumed, pursuant to adjournment, at 2:00 o'clock p.m., on January 18, 1956, at which time all counsel and parties were present.

The Court: Any further examination, Mr. Wuerthner?

Mr. Wuerthner: Yes, your Honor.

PAUL G. ANSPACH

resumed the stand and testified as follows:

Cross Examination—(Continued)

Q. (By Mr. Wuerthner): Now, Mr. Anspach, I may have asked you this question this morning, I am not sure. Handing you Plaintiff's Exhibits 2 and 3 I will ask you whether those charges were assessed or made by you direct or under your supervision? A. That is right, they were.

Q. And this is directly under the control of your department?

A. The irrigation district is, right.

Q. And you sent Plaintiff's Exhibit 4 to the defendant, is that correct? A. That is correct.

Q. You either sent it or caused it to be sent?

A. That is right it was prepared in the irrigation office and went through the regular routine for mailing.

Q. But your job of project engineer requires you to [62] assess the irrigation charges?

A. That is right.

Q. And you did so? A. I did so.

Q. Now, Mr. Anspach, I will ask you where your authority came from to assess these water charges, these irrigation charges?

A. The authority is contained in a directive to the land division; it is a part of the lease contract.

(Testimony of Paul G. Anspach.)

Q. Was it made a part of the lease contract?

A. Made part of the lease contract.

Q. Do you have the original lease?

Mr. Wuerthner: Do you have copies, Mr. Cyr?

Mr. Cyr: I don't know whether or not there are better copies which are attached to the complaint, the copies attached to the complaint are true copies and admitted in the pleadings.

Mr. Wuerthner: Your Honor, we—is it necessary to introduce the files of the case in order to use a portion thereof?

The Court: It is often done, whatever pleading is used it is often introduced and marked but it is really a part of the case and I have never thought it necessary to do so.

Mr. Wuerthner: Very well. [63]

Q. (By Mr. Wuerthner): Mr. Anspach, I am handing you the Government's complaint in this matter and specifically referring you to Exhibit C, which is the 44 farming and grazing lease, and also Exhibit D, which is a 46 farming and grazing lease, and ask you to examine those leases and determine whether or not, where your authority came from to assess these operation and maintenance charges? You have said they were contained in a directive which was made a part of the lease, will you show us that directive in the lease?

The Court: Does counsel know of any particular place where it can be found? It might save him a lot of reading and save us some time.

(Testimony of Paul G. Anspach.)

Mr. Cyr: It is at the bottom of the first page, last line.

Mr. Wuerthner: Will you show the witness where you are referring, Mr. Cyr?

Mr. Cyr: Your Honor, this is the notice which is in question for which we have asked reformation on the basis of the pleadings; it does not appear in this lease and we will object to this.

The Court: And has it any reference to the question propounded by Mr. Wuerthner, in the notice that has any bearing on it?

Mr. Cyr: No, it is not there and for the record we object because it lacks materiality because it is not [64] necessary it be in the lease; it is a matter of law.

The Court: He can ask if there is anything in there in reference to that subject?

Mr. Cyr: Yes, but he is asking by what authority he assessed this property and it isn't by virtue of the lease or anything else, it is by virtue of law.

Mr. Wuerthner: Well the United States Attorney then admits there is no authority in the 44 lease for the witness to assess these O & M charges?

Mr. Cyr: Your Honor, I am not on the stand and I am not under oath and he can't prove it. I don't know.

Q. (By Mr. Wuerthner): Then your answer is, Mr. Anspach, that it is not contained in this lease, Exhibit C?

A. With the exception of one reference, "If it is shown to be necessary to practice weed eradica-

(Testimony of Paul G. Anspach.)

tion for one year only out of 5, water charges will not be required for that year if water is not used."

Q. And that is your reference?

A. That is the only reference in this particular lease.

Q. And what you have just testified to was your sole authority for assessing O & M charges on the basis of the '44 lease?

A. Our authority is a directive from the Interior Department, which is a matter of law, I believe. [65]

Q. Yes, and that directive was then made a part of this lease? A. I wouldn't know that.

Q. You don't know whether the defendant knew anything of this directive?

A. Not in the lease proper I wouldn't know; I believe the advertisement expressed it.

Q. And did you inform the defendant of this advertisement which you testified to?

A. No, that would come from the agency office proper.

Q. In other words, you were attempting to assess O & M charges on the directive which is not contained in this lease between the Government and Mr. Aiken?

A. In the lease proper I would say yes.

Q. Now, Mr. Anspach, referring to Plaintiff's Exhibit 1 and the portion that is colored in red, you note that portion of that map? A. Yes.

Q. Now do I understand your testimony to be that a part of the portion colored in red is not

(Testimony of Paul G. Anspach.)

susceptible to irrigation? A. That is right.

Q. And approximately what part of that portion is not susceptible percentagewise?

A. Well I would have to look at the schedule because [66] I can't recall, I can't recall the individual tracts. I believe Exhibit 3 gives the exact acreage on each unit.

Q. Well referring you to Plaintiff's Exhibit 3 can you tell us approximately what percentage of the area colored in red is not susceptible to irrigation?

A. Well it is practically 100 acres out of the 240; no, it is 62 acres out of 200 acres.

Q. That cannot be irrigated?

A. That cannot be irrigated.

Q. That is a little more than a third of the area, a little less than a third of that area cannot be irrigated? A. That is right.

Q. Now referring again to Plaintiff's Exhibit 1 will you please point out to the court the closest irrigation ditch to that area in red?

A. Here is the irrigation ditch right here.

Q. And that is the ditch found in section 30, is it not? A. That is right.

Q. And where is the main part of the red portion located?

A. In section 29 and 30.

Q. Now approximately how far from the closer boundary of the red colored portion does that map show the terminus of an irrigation ditch?

(Testimony of Paul G. Anspach.)

A. Diagonally across the 40 acres tract would be some place around 2,000 feet. [67]

Q. In terms of miles about what would that be?

A. About half a mile, between a quarter and half a mile.

Q. How is it then, Mr. Anspach, that you or your office is attempting to charge the defendant with O & M charges when the ditch only runs to approximately one-half mile to the closest portion of the land covered by that area?

A. The regulation that we operate under is that water delivered to a farm unit or allotment, a farm unit is the land that is under control of one and we deliver water to that land and it is up to him to distribute that water over the several acres of his holdings.

Q. Under the belief it was feasible for Mr. Aiken to distribute water from the terminus of No. 4?

A. Distribute directly on to his leased land.

Q. It would be approximately one-half mile from the terminus No. 3 to the closest point of the land covered by the red coloring?

A. Less than half a mile.

Q. And that would be according to your interpretation up to the operation of the defendant?

A. Very definitely.

Q. How close do you have to run to a *termi* to the land in order to come within the regulation?

A. We deliver just to the borders of the land.

Q. Do you conduct it to the border of the land covered [68] by the separate leases?

(Testimony of Paul G. Anspach.)

A. Not by the separate lease but by the landholder, the operator.

Q. And if the lease land runs in a long parallel line and you deliver to the, we will say to the westernmost portion, then it is up to the land owner to get the water to the eastern portion regardless of the distance?

A. Very definitely. The regulations specifically call for delivery to an allotment on the farm unit.

Q. Now what regulations are you referring to?

A. Referring to the rules and regulations submitted to us by the Interior Department.

Q. And do you make those regulations public?

A. Why certainly they are public.

Q. Do you make them available to your lease holders? A. I believe the——

Mr. Cyr: Your Honor, we are going to object to this line of questioning, the court knows the code federal regulations have the effect of law when published; counsel is an attorney and he knows these are all regulations which have been published or should know they are matters of law to be determined by the court; the question is argumentative.

The Court: Well it is to a certain extent, yes, but he is looking for information as to what they did and whether the regulations were brought to the attention of the defendant, [69] and I think maybe you have gone far enough along that line but it is proper to make an inquiry what was done and what information was imparted to the defend-

(Testimony of Paul G. Anspach.)

ant at the time these leases were issued. All right, go ahead.

Mr. Wuerthner: Read the last question.

(The last question was read.)

Q. Did you make them available to your leaseholders?

A. When they first came out they were sent to every user of land on the irrigation project and I wouldn't say that every water user that came on to the project, every little water user that came on to the property afterwards was supplied a copy, but they were available and had been when originally sent to us and distributed throughout the area.

Q. And I believe your testimony is that these regulations become a part of the leases?

A. No, they are a part of the irrigation operation rules and regulations.

Q. But they are not a part of the leases involved?

A. They are two separate transactions entirely.

Q. Now, Mr. Anspach, handing you Defendant's Exhibit 5 I will ask whether or not you can identify it? A. Yes.

Q. Will you identify it?

A. That is a statement of the unpaid irrigation charges [70] by years by leases sent out to each individual lessee on the project who had any delinquent charges and that is the copies that was sent to Mr. Aiken in October, 1950.

Q. Now was that sent under your direction and supervision?

(Testimony of Paul G. Anspach.)

A. Not in October, 1950; I left in August, 1950.

Q. Who was there at that time?

A. Mr. Stout.

Q. Is this the general form sent out from your office?

A. That is the general form that was sent out.

Q. Now referring to Plaintiff's Exhibit 4 I will ask you to tell the court the reason for the additional charges assessed in 47 as compared with 45 and 46, if you know?

A. In 45 and 46 it included the one lease which we called the 44 to 48 lease; in 47 he had made the 46 to 50 lease and he hadn't paid on that, and that was added to the delinquent charges for the previous lease. It specifically shows two different leases.

Q. Now what is the policy of your office in collecting these water charges, do you collect them at the end of the season or when?

A. They are, according to regulations they are due in advance; if not paid in advance, then they are notified at that time. I believe it was the 31st of October that they were due and after that they were subject to a penalty and [71] in October it was our policy to notify everybody who had delinquent charges for that year or any previous years.

Q. Now I believe you were project engineer in 44 when Mr. Aiken entered into this lease with the Government, were you not? A. I was.

Q. And at that time were the water charges

(Testimony of Paul G. Anspach.)

payable in advance? A. They were.

Q. Were they collected in advance?

A. They were not.

Q. Why not?

A. They were; in case the farmer used water he had to pay in advance if he wanted to use water and if he determined not to use water, there was no way we could force him to pay it in advance. According to the rental regulation they were payable as of October 31, the latest regulations.

Q. For '44 do you mean?

A. No, that was a regulation prior to, I believe, about 33 it was set up as a due date that a penalty applied thereafter.

Q. So that in October following the first year of the lease the water charges were payable by Mr. Aiken? A. Yes.

Q. And you didn't collect them? [72]

A. No.

Q. Why didn't you? Did you collect any during that year? A. He didn't pay it.

Q. Did you attempt to forfeit his lease?

A. No.

Q. Didn't you have that right?

A. No, I had no right to do that; that was the province of the agency land department; the collection of the irrigation charges was also in their department.

Q. The assessment was in your department?

A. Yes, sir.

Q. And the collection was in whose department?

(Testimony of Paul G. Anspach.)

A. The land department of the agency.

Q. And who was in charge of that department at that time?

A. I am not sure whether Mr. Power was there then or whether it was Mr. Cross. Mr. Cross was there ahead of Mr. Power and I don't recall when they transferred.

Q. Do you recall having any discussion with Mr. Aiken with regard to the assessment of these water charges?

A. No.

Q. You at no time discussed it with him?

A. Not that I recall.

Q. Prior to his entering into the lease?

A. No, not that I recall. I may but I don't recall it because there are many of them come in and I can't recall [73] individual cases.

Q. Now in order to get the record straight as far as your testimony is concerned is your testimony to the effect that if the user did not take water during a season that he was liable to pay for the water whether he used it or not?

A. Very definitely.

Q. Now do you know what regulation has that requirement?

A. Well I can't stipulate the regulation but I believe it is of record in the files here.

Q. You don't know offhand?

A. No.

Q. Could you find it if the files were given to you to look over?

A. I don't know whether I could find it myself personally, no.

(Testimony of Paul G. Anspach.)

Mr. Cyr: I will hand the witness the complaint with the assessment attached in the case referring to the bottom of the fourth paragraph.

Q. What are you referring to now, Mr. Anspach? A. Well, it is——

Q. Are you referring to the sale of farming and grazing leases as shown by Exhibit A of the complaint, that is the advertisement for these leases? A. Yes.

Q. Now what are you referring to therein?

A. Well I presume, it says: "Where summer fallow is——

Q. Just a minute. You are now reading from about the middle of paragraph 4?

A. Paragraph 4: "Where summer fallow is practiced it will be necessary for cover crop to be sown in ample time to reach a protective growth for winter, as no land in the irrigation area is to lie fallow during the winter months."

"In the irrigable area, at least one of the 5 must be allotted to the use of a legume such as alfalfa or sweet clover. Where it is necessary to practice weed eradication by summer fallow, the lessee may do so, and there will be no charge for water. But this elimination of water charge may be for one year, only, out of 5."

Q. Now that paragraph refers to the irrigable area, is that correct?

A. That is irrigable area.

Q. Now referring to this paragraph 3 of that same exhibit will you kindly read that?

(Testimony of Paul G. Anspach.)

A. "Where water for irrigation is available, lands generally may be farmed and bids will be considered on a farming basis on sod land, including those listed herein as grazing; provided, of course, the soil is what might be expected to be productive."

Q. Now it is your contention water was available to irrigate the entire tracts of land in both leases? [75] A. No, I never said that.

Q. Well subject to the some 60 acres elimination? A. That were non-irrigable.

Q. And the rest of it was subject to irrigation?

A. Subject to irrigation.

The Court: The landowner had to operate his own water laterals?

A. Assuming the water reached his place.

Q. (By Mr. Wuerthner): Now I call your attention to the last two sentences in paragraph 2 thereof?

A. "Land in the dry land areas must be farmed by the strip method and any new dry land broken must be stripped the third year and thereafter."

Q. Now can you indicate where the dry land area is by that map?

A. Not by that map because it isn't designated by topography and the designation of the land is not on that map.

Q. Just because there are irrigation ditches on this map then it is your contention the land is subject to irrigation?

(Testimony of Paul G. Anspach.)

A. That is right, there is distribution to the land and water can be delivered to the land.

Q. Now do you know how the land was farmed in that area during the years Mr. Aiken held it?

A. No.

Q. You were never out on the land?

A. I might have been when I was out there I wasn't paying attention to boundaries; I do not know which land was which.

Q. How is land generally farmed out there during that period, would it be summer fallowing or strip farming?

A. Part of it would be summer fallow and part of it was strip farmed. Where the water could not be delivered they are all strip farms according to the lease stipulation but for me to try to remember a particular tract of land I can't do it.

Q. Now referring to the years that you have testified to here irrigation water was used on this land you said, I believe it was back in 33, the last time water was used to irrigate the land in question?

A. I didn't specify what year it was because I don't know.

Q. Do you have any idea the last year irrigation was practiced on this land?

A. On this particular tract of land?

Q. Yes.

A. I don't know whether it was ever practiced on this particular tract of land.

(Testimony of Paul G. Anspach.)

Q. Do you recall when a portion of this land was broken? [77] A. No.

Q. Isn't it a fact that after the land is first broken it is not susceptible to irrigation, then later on the soil is heavier?

A. No, I don't know that it is.

Q. Do you know whether or not any erosion went on in this area we are discussing during the years of the lease in question?

A. Wind erosion or water erosion?

Q. Yes, both?

A. There was lots of wind erosion all over the whole project; it was our big problem to keep the erosion out of our ditches.

Q. What did you do to stop the erosion during that time? A. We did nothing.

Q. What did you suggest?

A. Well we didn't suggest because we were—we were not in control of the farming operations.

Q. Do you know what stops erosion?

A. Cover crop will stop erosion or rough summer fallow will stop erosion.

Q. Summer fallowing stops erosion?

A. Summer fallow.

Q. Isn't it a fact that the best way to stop erosion is strip farming, a method which has been practiced in this [78] area for many years?

A. On dry land, yes.

Mr. Julius Wuerthner: Your Honor, we don't ordinarily like to make any objection of this kind but this witness is making different motions that

(Testimony of Paul G. Anspach.)

my partner doesn't see and might we ask that he be requested to sit over here and not make any motions; he just did that on the question about erosion, your Honor?

Mr. Harlow Pease: Are you saying I gave the witness any signals, sir?

Mr. Julius Wuerthner: I request, your Honor, that——

Mr. Harlow Pease: I request, your Honor, that I be permitted to sit where I can hear what the witness says. The counsel speaks in a loud voice and the witness in a low voice and I have difficulty hearing. I deny I have done anything counsel suggests.

Mr. Julius Wuerthner: There is a seat here.

Mr. Harlow Pease: I will not take dictation from counsel. I will ask your Honor——

The Court: I have known Mr. Pease for a good many years and I don't think he would make any signals to the witness or try to do anything of the sort; he was Assistant United States Attorney for a good many years and handled cases before me in Butte, Missoula and around and I can't listen to any such charge as that. [79]

Mr. Wuerthner: We would just ask the court to admonish him he not use any because I observed him and the court probably didn't.

The Court: Well you might have thought that was it and you might have been wrong in so thinking; but I have known him too long to have something like that sprung on him. Proceed.

(Testimony of Paul G. Anspach.)

Q. (By Mr. John Wuerthner): Now you are referring again to Exhibit A of the complaint and specifically referring you to a description of the various allotments are you acquainted with the description of those allotments?

A. Not as allotments, no.

Q. Well is that the general way in which the allotments are put out for bid? A. Yes.

Q. And is that the manner in which they are followed?

A. That is the manner in which they are followed in the irrigation section; we pay no attention to the names; its land description only that we refer to except in the water users ledger and that is in the water users ledger the landowner's name is posted in the water users ledger, but as far as using the allotment numbers and names we don't because our records are all strictly by land descriptions.

Q. Now referring you to the furthest righthand column [80] there where it is under the heading of "use," I note there that it is broken down as farming and grazing land, is that correct?

A. Yes.

Q. Now is that the general way in which you describe the use of the land in the various invitations for bids?

A. We don't make the invitations for bids. They are made up in the land office and all we do is at their request we give them the irrigable acreage of the individual tracts. They make all the invita-

(Testimony of Paul G. Anspach.)

tions. They make all the advertisements. Our records are made simply from a completed bid or completed lease and after the lease is completed we are furnished with a copy and then our records are set up in accordance with the terms of the lease as made.

Q. And the lease is based upon the terms contained therein? Now I am referring again to the general lease.

A. Well that isn't the way it comes to us. Now as far as we are concerned this farming land might be dry farm land and it might not be subject to irrigation at all.

Q. Now I noticed this bid was dated February 1st, 1944, were you superintendent at that time or the project engineer?

A. I was project engineer.

Q. And at that time you were familiar with the way they use to put out their land on bid?

A. Yes. [81]

Q. How did it happen there is nothing mentioned there with regard to irrigable and non-irrigable land, is that an oversight on somebody's part that year?

A. I don't know why it was put out in that particular form.

Q. How is it usually put out?

Mr. Cyr: Your Honor, we will object to the question and the whole line of questioning on the ground this witness says he does not know anything

(Testimony of Paul G. Anspach.)

about this; it is argumentative, immaterial and incompetent as to this witness.

Mr. Wuerthner: I believe he testified, your Honor, these bids come out and it is specified in a column whether irrigable or non-irrigable land.

Q. You know about that, do you not?

A. I didn't say specified in the column in the advertisement. It is specified as I recall that certain lands are irrigable and will be subject to the irrigation charge.

Q. Isn't this an exact copy of the advertisement? A. I don't know.

Q. I will tell you for your information this is an exact copy of the advertisement for bids which is a part of the Government's complaint?

A. Yes.

Q. In other words, that is the way the bids appeared at that time? [82]

A. Those were put out for bids. Now farmers will bid on that so much for farming land, so much for grazing, so much for dry farming land and so much for irrigated farming land.

Q. But you can't explain at this time why the farming land was not broken down as to whether it is irrigable or non-irrigable land?

A. No, I can't explain that.

Q. Now handing you Defendant's proposed Exhibit 6 I will ask you if you can identify that?

A. No, I can't identify it. It isn't any of my records. It originated in the agency land division.

(Testimony of Paul G. Anspach.)

Q. You had nothing to do with that?

A. Nothing to do with it whatever.

Mr. Pease: Would you show what document was incorporated in that question?

Mr. Cyr: Mr. Wuerthner, I believe the record does not disclose what you were referring to in that last question propounded to the witness.

Mr. Wuerthner: Very well.

Q. Handing you Defendant's Exhibit 6——

Mr. Wuerthner: Do you want me to identify it to him so the record will show?

Mr. Cyr: It wasn't identified by number.

Mr. Wuerthner: Defendant's Exhibit 6, which the witness does not identify.

Mr. Wuerthner: I think that is all. [83]

Redirect Examination

Q. (By Mr. Cyr): I believe you testified on cross examination, Mr. Anspach, that you had inserted the terminus points of the ditch marked on Plaintiff's Exhibit 1 from the location of this ditch on a project map, is that correct?

A. That is right.

Q. I will hand you what has been marked as Plaintiff's Exhibit 7 and ask you if you can identify that, please? A. The map?

Q. Yes, what is it?

A. That is a print of the regular project map, the official land description, designation maps.

Q. And were these maps prepared under your direction and supervision?

(Testimony of Paul G. Anspach.)

A. No, they were prepared under a special survey that was setup for the purpose of land designation. I act only as in a supervisor capacity on particular things that might come up.

Q. And do you know of your own knowledge as to the, from records of the office and from your position as the project engineer the location of the various items which are designated on this map?

A. I do. [84]

Q. And do you know from your own experience and from your knowledge as project engineer that the places where the ditches are located on that map are accurate? As of the date the map was made?

A. They are.

Q. And do you know when that was done, sir?

A. This map was made in 31 and 32; it was made in my office by outside surveying crew.

Q. Now does this map contain the lands which are here in question?

A. It does.

Q. And referring to that, does that from your own knowledge and experience as project engineer show the location of the terminus of the ditches on the lands in question at that time?

A. It does with two exceptions; at the time this map was made there were two lateral extensions that were made subsequent that were not made at the time this map was revised in 41.

Q. Does this show the location and terminus of the ditches at the time Mr. Aiken leased the land?

A. With the two exceptions.

Q. Now by that the two exceptions are you ex-

(Testimony of Paul G. Anspach.)

plaining that—will you explain that a little further? I don't understand. [85]

A. There is only one in question. There is one ditch here, No. 3.

Mr. Wuerthner: Just a minute. Your Honor, before there is any testimony with regard to this exhibit we ask it first be offered in evidence so we may put our objection in if we have one.

The Court: These are for the identification?

Mr. Cyr: These are further identification.

The Court: Yes, it is explanatory and identifying but before going into any question of fact in respect to it it should be shown to counsel on the other side first.

Mr. Cyr: Would counsel care to come up so we can see what we are referring to here.

Q. You were saying, Mr. Anspach?

A. You want Exhibit 1, termed as No. 1; That ditch shows it is in a position that it carried even beyond that point there and this ditch No. 2 on the exhibit is there. This ditch was subsequently put in. It didn't affect Mr. Aiken's lease. It was some land that was not leased by him. And No. 4 was definitely in at the time the revision of this map was made in 41.

Q. Now I will hand you a red pencil if you will step down just for a moment and would you mark on this map the same ditches which appear on Plaintiff's Exhibit No. 1 as you have marked their terminus? [86]

A. This is the terminus of this ditch here.

(Testimony of Paul G. Anspach.)

Q. You have marked that No. 1 to correspond with No. 1 on Plaintiff's Exhibit?

A. This is No. 2.

Q. You are writing on the scotch tape; it was right next to the scotch tape?

A. No, No. 3 was put in subsequent to this; it didn't affect the land leased by Mr. Aiken, and here was the terminus of No. 4.

Q. Do I understand No. 3 does not appear on this map?

A. Here is No. 3; it appears as proposed ditch in 41; when this map was made; it had not been completed.

Q. But ditches 1, 2 and 4 had been completed?

A. Yes.

Q. And you knew that of your own knowledge?

A. I knew it.

Q. And this map accurately portrays the location of those ditches on this map?

A. That is right.

Mr. Cyr: We offer in evidence Plaintiff's Exhibit No. 7.

The Court: Any objection?

Mr. Wuerthner: Your Honor, may I interrogate the witness?

The Court: Yes, you may. [87]

Q. (By Mr. Wuerthner): Mr. Anspach, you testified this was revised in 41?

A. That is right.

Q. Where does the 41 revision appear on this?

A. It does not appear.

(Testimony of Paul G. Anspach.)

Q. How do you know then?

A. I know it because Mr. Alex L. Heath, Assistant Engineer for me at the time, made those revisions in the winter of 41 and 40 and he was transferred from the project in 41 and there has been no revision made of those maps since.

Q. Where is that gentleman at the present time?

A. I would not know; he is in the Government service.

Q. There is nothing appears on this map to show the 41 revision of it? A. No.

Q. So far as this map it is on the face this is a 31 map? A. 31 map, that is right.

Mr. Wuerthner: What is the purpose of offering this in evidence, in corroboration of this map?

Mr. Cyr: That is to establish the terminus of the ditches. You on cross examination questioned him as to the reason he located the terminus of the ditches at the places that he did and we want to show it was by this map. [88]

Mr. Wuerthner: Well if those terminus are the same as appear on the Exhibit No. 1, we have no objection. We have no time to compare them.

Mr. Cyr: Well they are.

The Court: Under that objection it may be admitted in evidence.

Q. (By Mr. Cyr): And it was on the basis of the information you had from this map which is marked Plaintiff's Exhibit 7 that you have placed the terminus as indicated on Plaintiff's Exhibit 1?

A. As near as they show in Exhibit 1. I believe

(Testimony of Paul G. Anspach.)

that map shows if there is any further extension than Exhibit 1 shows.

Q. On which ditch is that?

A. That is on No. 1.

Q. You are referring to Plaintiff's Exhibit 7 at the time you are referring to Exhibit No. 7?

A. That is right.

Q. And the ditch numbered 1 extends about half a mile further than that on No. 1?

A. It did in 41.

Q. Now do you know whether or not there were any changes after that in those ditches, were any of them destroyed?

A. Not that I know of. There was a number of extensions [89] made to those ditches subsequent to 41 but I couldn't say which ones and what year.

Q. Do you know whether or not those same ditches were used and continued to be used as ditches for the period until you retired?

A. Yes.

Q. Now there was some question on cross examination as to the rate of assessment, now can you tell the court who fixed the rate of assessment on these?

A. The Secretary of The Interior.

Q. You have no control over that?

A. No control.

Q. Now do you know how the dry lands and irrigable lands were designated, is there anything you have which would indicate the manner in which they are designated?

(Testimony of Paul G. Anspach.)

A. They are on the maps.

Q. Yes.

A. Well, the designation survey that I referred to of 31 and 32 was a complete survey of the proposed project area and that survey, the topographic survey eliminated or depicted the high land above gravity flow and the lands that were too steep for irrigation, the steep or alkali lands were so shown on the schedule.

Q. Referring to Plaintiff's Exhibit 7, is that information shown on that map? [90]

A. Yes, by the hatching, the horizontal hatching, which has none in this particular area. Horizontal hatching depicted low or wet planes.

Q. The vertical hatching?

A. The vertical hatching was too steep for application of irrigation.

Mr. Wuerthner: May it please the court, that exhibit was introduced for the purpose of showing irrigation ditches as they existed and no other purpose; now if they are going into further matters, we will add further objections to that exhibit.

Q. (By Mr. Cyr): On this map was the surveying done with reference to these physical factors of the land while you were project engineer?

A. Yes.

Q. And was that done in part by you and under your supervision and direction?

A. No, they were done under a special survey party that were sent in to do that particular job alone.

(Testimony of Paul G. Anspach.)

Q. And did you have occasion to survey this same land within the project?

A. What do you mean by survey the same land?

Q. I believe you stated on direct examination that you surveyed this same land for the location of the ditches? [91]

A. This original survey that designated the land laid out proposed ditches to several lands that were not already under service under ditch and I think at one time to extend those laterals we went out and resurveyed those proposed laterals and staked them for the machinery construct those laterals. Now that is the survey work that I refer to that I had helped.

Q. That survey was done for the purpose of locating the ditches?

A. Rather staking the ditch for construction.

Q. And what considerations did you make in locating the place where the ditches were to be constructed?

A. Well, the gradient, water gradient, the point and grade gradient would reach; in other words, the point water would flow through a ditch.

Q. Was that based in part or in whole upon the matter gained for the survey upon which this map was prepared?

A. Yes. Once in a while we found a spot we could remedy and change but generally we followed the survey setup.

Q. So this map the actual survey work you did with reference to the location of the ditches was

(Testimony of Paul G. Anspach.)

done in order to effectuate the plan as set out in this map, is that correct? A. That is right.

Q. And you did actually survey that yourself and with men under your direction? [92]

A. I did.

Q. And as a result of that did you observe the physical factors which are set forth in this map marked Plaintiff's Exhibit 7? A. I did.

Q. And did those things as they appeared to you, those physical factors conform with the physical factors as set forth on Plaintiff's Exhibit 7?

A. They did.

Mr. Cyr: Now we wish counsel to understand this map is offered for the purpose of showing the types of lands.

Mr. Wuerthner: Just for illustration purposes?

Mr. Cyr: Well I think it goes further than that; it depicts the lands which are irrigable and non-irrigable, is that correct, Mr. Anspach?

A. That is right.

Mr. Cyr: We don't want to mislead counsel it is offered for that purpose only.

Q. (By Mr. Wuerthner): Will you point out the difference between the irrigable and non-irrigable land?

A. Any land that is within the heavy boundary which we said was the boundary of the project, any land which is hatched one way or another is not irrigable land, and one hatching depicts high land, this hatching depicts low or [93] alkali land,

(Testimony of Paul G. Anspach.)

and this hatching depicts steep that is not logical to try to irrigate.

Mr. Wuerthner: To the introduction into evidence of Plaintiff's Exhibit 7 for the purpose of showing the irrigability or non-irrigability of the land the defendant objects on the ground and for the reason that the map was made in 31; there is nothing shown thereon to indicate that there has been a later revision so as to effect or affect the defendant, who subsequently went on the land under the lease. This is some 13 years later and there will be further testimony introduced here to show that as a result of breaking the land the contour of the land changes and the character of the land changes, and for that matter this map is too remote in time and place to show the condition of the land as it existed at the time Mr. Aiken took the lease in question.

The Court: I think it may have some applicability; I will overrule the objection and admit it in evidence. Proceed with your examination.

Mr. Cyr: Yes. Just a moment, your Honor; I may be finished.

Q. (By Mr. Cyr): With reference to what has been marked as Plaintiff's Exhibit 4 I believe you have stated that the original which was sent to Mr. Aiken had other printing on it other than the figures which appear on that copy? [94]

A. Yes, they are a mimeograph form and this is the insertion in that mimeograph form. The

(Testimony of Paul G. Anspach.)

body of the form does not show on this. This was kept simply as an office memo copy.

Q. And would a copy of that have been furnished the Indian Agency office?

A. To the land division of the Indian Agency, the Tribal Counsel and to the lessee himself.

Q. I will show you what has been marked as Plaintiff's Exhibit 8 and ask you if you can identify that with reference to Exhibit 4?

A. That is the mimeograph form that is used and the same information as in the office copy.

Q. That is in Plaintiff's Exhibit 4?

A. That is right.

Mr. Cyr: That is all.

Recross Examination

Q. (By Mr. Wuerthner): Mr. Anspach, when you testify with respect to the irrigability and the ditches that are involved in this it is based on a technical standpoint rather than a practical standpoint, isn't it?

A. I don't believe I get your question exactly.

Q. Isn't it a fact that your testimony with respect to these ditches that were on the land involved is based on a technical standpoint rather than a practical standpoint or a standpoint of use by the farmer involved?

A. Well, I don't know just from a technical point of view the land could be irrigated from the ditches.

Q. Now could it be from a practical point of view?

(Testimony of Paul G. Anspach.)

A. That would have to come from somebody else.

Q. You don't know anything about the practical aspect?

A. I am not a farmer.

Q. You are not an irrigation farmer?

A. I am not an irrigation farmer.

Q. Did you have any experience with building irrigation ditches other than on this project?

A. Not other than on this project.

Q. Do you know whether or not the ditches that were constructed do carry water?

A. I do.

Q. Do you know whether they did carry water for the areas shown that they extended in these maps in evidence?

A. They were calculated to carry the water.

Q. But from a practical standpoint?

A. From a practical standpoint they did.

Q. How do you know that?

A. They were constructed to carry what was considered a [96] headwater of 21½ second feet.

Q. But were these ditches ever practically tried out? Did you actually have water in them?

A. I can't tell you. I didn't put water in, I don't know if the man didn't irrigate and I don't know whether they were tried out clear through that land or not. I didn't operate them personally.

Q. Did you ever see water in those minor laterals you have been testifying to?

A. I can't swear that I did.

Q. Now you have testified that there have been

(Testimony of Paul G. Anspach.)

no changes in that land with respect to the irrigation system since 41, is that your testimony?

A. There has been no change in the land but there have been changes in the irrigation system.

Q. Now I believe you said this morning you haven't been on that land since '40 or so, how is it you know there are no changes in the land?

A. Well I don't know what changes there could be in the land other than the change from sod land in some cases to farm land; the topography would not change other than some erosion changes.

Q. Then your testimony in that respect is based on conjecture? A. That is right.

Mr. Wuerthner: That is all. [97]

Redirect Examination

Q. (By Mr. Cyr): About how many miles of irrigation ditch were built in that project during the time you were project engineer, do you have any idea?

A. There are a number of miles but I couldn't, that is a matter of record and I couldn't recall.

Q. Considerable irrigation ditches?

A. Oh, yes.

Q. And they were designed for the purpose of carrying water? A. Correct, they were.

Q. And did you get complaints they didn't carry water?

A. Sometimes, yes; sometimes people couldn't get as much water as they wanted and there was always complaints.

(Testimony of Paul G. Anspach.)

Q. And in those instances could you remedy it?

A. The best we could.

Mr. Cyr: That is all.

Mr. Wuerthner: No further questions. I would like permission from the court to ask one further question.

Recross Examination

Q. (By Mr. Wuerthner): You stated this morning you are now retired? A. That is right.

Q. Are you engaged in any other business at the present time in your retired capacity?

A. No.

Mr. Wuerthner: That is all.

FRANK KUKA

was called as a witness and testified as follows:

Direct Examination

Q. (By Mr. Galles): Would you state your name, please? A. Frank Kuka.

Q. Where do you live and what is your occupation?

A. I live in Valier and I am a ditch rider for the Government.

Q. On what project?

A. The Badger Fisher Blackfeet Project.

Q. Is that the same irrigation project that Mr. Anspach has been testifying about?

A. Yes, sir.

Q. How long have you been a ditch rider?

A. 26 years.

(Testimony of Frank Kuka.)

Q. Continuously during that time? [99]

A. Yes, sir.

Q. And you still are the ditch rider?

A. Yes.

Q. Are you familiar with the lands that are involved in the leases which were issued to Mr. Aiken in 44 and 46? A. Well, I am.

Q. Have you inspected the laterals, both major and minor laterals as they have been called here in the vicinity of his land? A. Yes.

Q. Have you observed at any time water in those laterals? A. Yes.

Q. When did you observe water in those laterals? A. When last?

Q. Yes. A. Last year in '55.

Q. And for how many years has water been in those laterals?

A. Well practically every year to an extent and we run water it wasn't used for irrigation purposes, we put it into reservoirs at the end of those laterals.

Q. I will hand you what has been admitted in evidence as Plaintiff's Exhibit 1 which shows the leases to Mr. Aiken, the 44 lease being shaded in green and the 46 lease being shaded in red, and ask you at what points you have observed [100] water with reference to Mr. Aiken's leased lands?

A. Well I could answer that better what other one is because I am not familiar with this map.

Q. Well I will hand you Plaintiff's Exhibit No. 7 and ask you the same question?

(Testimony of Frank Kuka.)

A. This one was extended out here a little further. I forgot what the question was.

Q. At what point closest to Mr. Aiken's land did you observe water in the laterals?

A. To the end of these ditches. We have a reservoir in this one and I have run water down there.

Q. Now you are referring to the ditch marked No. 1 in red on this exhibit? A. Yes.

Q. Would you step down to the table with your green pencil and mark with the letter A the furthest point at which you observed water during the years, Mr. Aiken held these leases?

Q. Now with reference to the point that Mr. Anspach marked as No. 2 would you mark with the letter B the furthest point toward Mr. Aiken's land that you observed water during the years he had the leases?

Q. Now with reference to the point Mr. Anspach marked No. 4?

A. I had water on this one too. [101]

Q. Would you mark with the letter C the point to which you are referring to that you had water in this one too?

A. This No. 2 here, we extended this lateral in '41. We extended that lateral in '41. I had water out there.

Q. You are attempting to mark on the scotch tape and it does not mark. It is in the middle of the scotch tape. Why don't you put the letter C on each side of the scotch tape at the point we are referring to? Now with reference to the figure 4

(Testimony of Frank Kuka.)

that is on Exhibit 7 at what point did you observe water closest to Mr. Aiken's land? Would you mark it with the letter D, please?

A. You mean during the time he had the lease?

Q. Yes. A. Water here.

Q. Is that the closest point to Mr. Aiken's land?

A. No, I have seen it down here.

Q. That is the point I want you to put the letter D? Did you put two D's on the scotch tape, and for the record it will be the point as seen between the two letters. Now you have so marked the exhibit, is that correct? A. Yes.

Mr. John Wuerthner: May I suggest to the court that the defendant's land be outlined on this map in red? We are kind of misled by the exhibit. I don't believe the land has been shown on there. [102]

The Court: You can take that up and develop it on cross examination.

Mr. Wuerthner: Very well, sir.

Q. (By Mr. Galles): There were headgates, were there headgates in the irrigation system at the points you have marked with the letters?

A. At one time, yes.

Q. Were there headgates there during the time Mr. Aiken had the leases? A. Yes.

Q. And is that the point at which the water was delivered to and is that what was the reason it wasn't down further because of the headgates?

A. It was never called for any further; there was no reason to deliver it beyond there.

(Testimony of Frank Kuka.)

Q. That was the end of the constructed ditches?

A. Yes.

Mr. Galles: You may examine.

Cross Examination

Q. (By Mr. Wuerthner): Mr. Kuka, have you been employed on this job for 26 years did you say?

A. Yes, sir.

Q. Have you always been a ditch rider on this project? A. Yes, sir.

Q. Do you know what ditches were in existence in 44 in regard to the defendant's land here?

A. Yes.

Q. Do you know what ditches were in existence on that land in '39? A. Yes, I do.

Q. Do you know whether or not the defendant farmed this land in '39? A. I believe he did.

Q. And do you know whether or not he farmed it from that time until '44 when he took the lease in question? A. Yes.

Q. Are you familiar with O & M charges?

A. No, I didn't have no part with that.

Q. You had nothing to do with the assessment of the charges? A. No.

Q. Now, Mr. Kuka, I am handing you the Plaintiff's Exhibit 1, now you will notice that exhibit has outlined in green the defendant's land? Is that approximately where his land was under lease in '44?

A. I would say it was approximately. [104]

(Testimony of Frank Kuka.)

Q. And do you know that this red land, encased in red was also under lease by him?

A. I knew he had grazing lease down there but I don't know in particular.

Q. Now you are familiar with the contour of the land at that area?

A. Well pretty well; I have been there quite a while.

Q. Now would you explain to the court about that gully called rock gully?

A. That is right.

Q. And that runs through about the middle of the land indicated by the green shading?

A. Well I wouldn't say the middle. I would say it went to the north.

Q. Further north? A. Further north.

Q. Is that correct? A. Yes.

Q. Now is that gully a steep grade?

A. Well not right up to it; it is after you get up to it but I would say it wasn't too steep until you get right into it.

Q. Now you see located on this exhibit various red marks and blue marks, is that correct? [105]

A. Yes.

Q. Do you know what those marks represent?

A. No, sir, I don't.

Q. For your information they represent ditches; now is that approximately the situation with regard to ditches as they existed in '44?

A. You mean this was a ditch here?

(Testimony of Frank Kuka.)

Q. Yes. A. That wasn't there.

Q. Now will you step down and make some notations on this exhibit, please, so that the record will be straight? A. Yes.

Q. Now you have just testified that a portion of the ditch from this circle to this point was not constructed in '44?

A. Not that I know of, not to my knowledge.

Q. All right will you mark a No. 1 or one there on that? A. Like this?

Q. Yes, and No. 2 at the other extremity. Now the ditch shown by the, between the distance 1 and 2 was not constructed in '44, is that correct?

A. Not that I know; not that I recall.

Q. In red pencil 1 and 2, now do you know when that ditch was constructed?

A. I don't think it ever was. [106]

Q. It is not on there at the present time?

A. No.

Q. Now referring you to what has been marked No. 3 in red pencil, did you recognize that junction?

A. Yes, sir.

Q. What is that junction?

A. That is a division of this 19 K ditch here.

Q. That is a main lateral? A. Yes, sir.

Q. And the branch was the red letter 3, red letter 3 approximately there, now does that map substantially portray the situation with relation to the minor laterals that branch off as it existed in 44?

A. I would say that was fairly close.

Q. In other words, the ditch shown from red 3

(Testimony of Frank Kuka.)

to blue 4 is the situation regarding that minor ditch as it existed in '44?

A. This ditch is in there.

Q. And that is approximately correct then?

A. Yes, sir.

Q. Now with relation to red No. 4 and blue No. 3, is that the condition with respect to that lateral?

A. Is this 3?

Q. Yes.

A. Yes, I helped bring this one out there. [107]

Q. Does that extend on to the ditch line in section 30? A. It extends right to there.

Q. Right to the border?

A. Right to the line.

Q. Now calling your attention to a ditch or lateral which is shown as between red 3 and blue 2, does that ditch, was that ditch in there as of '44?

A. Up to about here, I would say.

Q. All right, will you mark a number, red 5 at that point? A. Yes.

Q. Now from red 5 to the point represented by blue No. 2, the ditch did not exist in '44?

A. I would not say. It could be formed or it might be in there, I don't remember.

Q. You don't know whether it was in there?

A. I don't recall.

Q. If it was in there, it would not come up to the defendant's land?

A. This one would here.

Q. All right now you are referring to a point

(Testimony of Frank Kuka.)

shown as red 6 to red 7, was that ditch in there in '44? A. Yes, sir, it was up to here.

Q. All right, it ran up to approximately red No. 8? A. Yes. [108]

Q. Now is that the ditch situation?

A. I think so.

Q. As it existed in '44? A. Yes.

Q. Now was it the same in '45?

A. Yes, approximately.

Q. How about '46? A. Same.

Q. '47? A. Yes.

Q. What about '48?

A. Well they were in there.

Q. Was there anything else done in '48?

A. As to what?

Q. As to the ditches?

A. Well we had a breakdown in the main canal.

Q. Where is the main canal that you are referring to?

A. It doesn't show it on that map.

Q. There are no laterals here that show the main canal, where it would be then?

A. No, these are branches off the main canal.

Q. And there was a breakdown in the main canal leading to lateral K and the rest of the exhibit? A. In '48.

Q. What happened then? [109]

A. We had a heavy rain and it washed the flume out and broke the ditch out.

Q. Where did that water escape to?

A. To the lower ground and into the river.

(Testimony of Frank Kuka.)

Q. Did it go into rocky gully?

A. No, it never got that far.

Q. Now the situation in 44 will you tell the court whether or not you saw water in any of these ditches, and, if so, will you indicate on the map the point at which you saw water?

A. In '44 to the end of these, to this one here I personally put water to it.

Q. So in '44 there was water to red 5?

A. That is right.

Q. And no further? A. No.

Q. Why couldn't you get it any further?

A. There was no call for water.

Q. Would it have gone further?

A. It would have, yes.

Q. You are sure of that?

A. If there was a lateral there.

Q. There was no lateral to carry the water to the defendant's land in '44?

A. Not that I know of. [110]

Q. All right, will you indicate any other ditches in which you saw water in '44?

A. I have seen water in this one in No. 4.

Q. You are referring to the ditch red 3 to red 4?

A. Clear through to the end.

Q. And the water was up to blue 4?

A. Yes.

Q. And that is the end of the ditch?

A. Yes, I put it out on this side. There was a turn out for reservoir over in here.

(Testimony of Frank Kuka.)

Q. What was your purpose in running water in these ditches?

A. Filling the reservoirs there from here.

Q. It was not used for irrigation?

A. No, it was not used for irrigation.

Q. Now what is the situation with regard to the ditch terminating at blue 1?

A. That is on the north side of the canal.

Q. Where is the furthest point you have had water there?

A. I have had the water out to the end.

Q. Clear out to the end represented by blue 1?

A. Yes.

Q. And what was the purpose for it out that far?

A. I ran it out there for waste as waste ditch.

Q. And you ran that then into the coulee? [111]

A. That is right, into this coulee here.

Q. Very well, you may take your seat. Now, Mr. Kuka, do you know the general terrain of this land that Mr. Aiken leased? A. Well pretty well.

Q. What type land is that?

A. It is sort of rolling; it is a heavy soil.

Q. Sandy soil?

A. No, it is heavy gumbo soil I would say.

Q. Is that soil susceptible to irrigation?

A. Yes.

Mr. Cyr: To which we object on the ground it is outside the scope of the direct and this witness has not been qualified as an expert and it calls for a conclusion and opinion of the witness.

(Testimony of Frank Kuka.)

The Court: Yes, I think so. You can qualify him if you want to examine him as an expert.

Q. How many acres could be irrigated out of this land Mr. Aiken leased?

Mr. Cyr: We object to that on the ground it is outside the scope of the direct examination. I don't see any probative value in the statement of this witness who has only been a ditch rider for the period in question.

The Court: Sustain the objection.

Q. Is it a fact, Mr. Kuka, you rode these ditches every [112] day? A. Yes, sir.

Q. Do you know what type farming Mr. Aiken did during the term of his lease?

A. Well part of it he strip farmed.

Q. Did he do any summer fallowing that you know of? A. Yes.

Q. How many acres approximately do you know? A. I wouldn't know.

Q. Did he practice any weed eradication?

A. Yes.

Q. Do you know whether or not Mr. Aiken ever used any irrigation water on this land from 39 to 49?

A. I delivered water personally to him in 42 in July.

Q. You what?

A. I delivered water to Mr. Aiken in 42.

Q. That water you delivered was it used on all of the acreage or a portion? A. A portion.

Q. Approximately how many acres did he use

(Testimony of Frank Kuka.)

that water on? A. 74 acres I believe.

Q. Did he call for any water after that time?

A. Well I can't recall it.

Mr. Wuerthner: That is all.

The Court: We will suspend here for a few minutes. [113]

Court resumed, pursuant to recess at 3:30 p.m., at 3:45 p.m., at which time all parties and counsel were present.

Mr. Galles: The next witness is Mr. Spencer.

CHARLES S. SPENCER

was called as a witness by plaintiff and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Galles): Would you state your name? A. Charles S. Spencer.

Q. Where do you live?

A. Browning, Montana.

Q. Your occupation?

A. Superintendent of the Blackfeet Indian Reservation.

Q. How long have you been so employed?

A. Since September 1, 1954.

Q. In your capacity as Superintendent of the Blackfeet Indian Reservation are you the official custodian of the records of that office?

A. Yes, sir.

Q. I hand you a file among which are some papers, one of which exhibit has been previously

(Testimony of Charles S. Spencer.)

marked Plaintiff's Exhibit 8, and ask you if that is part of your official records? [114]

A. It is, sir.

Q. And is that Exhibit 8 kept in the regular course of the business of the Indian Agency?

A. It is.

Mr. Galles: The Government offers in evidence Plaintiff's Exhibit 8.

Mr. Wuerthner: To the introduction of Government's proposed Exhibit 8 in evidence the defendant objects on the grounds and for the reason the same is a self serving declaration, and further ground that it is by its own term or states that is according to the provisions of the leases indicated and they have specified the two leases in question that the O & M charges were due and unpaid. Now by the Government's own witness he has testified there was nothing in the leases that O & M charges were due and payable.

The Court: Well let's see them.

Mr. Galles: Your Honor will recall Mr. Anspach identified the document, Exhibit 8, as having been a copy of what was sent to the Tribal office and the Indian Agency office and as well as one to the lessee, and as well as one copy in the engineer's office.

The Court: Yes, I think the objection should be overruled; it may be admitted in evidence. It is part of the official documents of the office. [115]

Q. (By Mr. Galles): Mr. Spencer, with reference to Plaintiff's Exhibit No. 8 would you state

(Testimony of Charles S. Spencer.)

what that document is as part of your official records?

A. That is a carbon copy of the statement mailed to Mr. Robert Aikens on January 2nd, 1948, of O & M charges due plus interest to January 31, 1947?

Mr. Wuerthner: May it please the court, we are going to object to the testimony on the ground the instrument speaks for itself.

The Court: Yes, but he can explain it.

Mr. Wuerthner: And we will further move that the answer of the witness be stricken.

The Court: The motion is denied.

Q. Mr. Spencer, I now hand you one of the papers from your official file of the agency which has been extracted and marked Plaintiff's Exhibit 9 and ask you to state what that is?

A. That is likewise a carbon copy of the statement.

Mr. Wuerthner: Now your Honor we object to that. We believe the proper question is can he identify it and the answer would be yes or no.

Q. Would you please identify it?

A. That is one of the official records of our office indicating the amount of O & M charges plus interest due at this particular time from Mr. Aiken.

Q. I notice this is a carbon copy, what happened to the original?

A. The original was mailed to Mr. Aiken.

Q. But this carbon copy is part of your official records of which you are the custodian?

(Testimony of Charles S. Spencer.)

A. It is.

Q. This Exhibit 9, Mr. Spencer, you will note consists of two pages, would you state what the difference is in the two pages? Why are there the two parts to the exhibit?

A. One of them pertains to lease No. 629 and the other to lease No. 761, so they are individual statements on the two separate leases.

Q. And those leases have heretofore been identified as the 44 and 46 leases? A. Correct.

Mr. Galles: The Government offers in evidence Plaintiff's Exhibit 9.

Mr. Wuerthner: To the introduction into evidence of Plaintiff's proposed Exhibit 9 the defendant objects on the same ground and for the same reasons as stated for the Plaintiff's Exhibit 8, and on the further grounds that there is no showing here this statement was ever received by the defendant and was not sent by registered mail and no evidence [117] he received it, and on the further ground that there has been no demand made on the defendant to produce the original of this document and therefore we believe that it is secondary evidence of the records and inadmissible.

Mr. Cyr: Your Honor, as official business record it does not come within the classification of secondary evidence but is primary evidence.

The Court: Is it the same as the other records?

Mr. Cyr: It is the same as Exhibit 8 and including the——

(Testimony of Charles S. Spencer.)

The Court: Overrule the objection; it may be admitted in evidence.

Q. (By Mr. Galles): Mr. Spencer, handing you again Plaintiff's Exhibit No. 9 would you state the date that this document was made, the original of which you testified was mailed to Mr. Aiken?

Mr. Wuerthner: We object on the ground the instrument speaks for itself.

The Court: Overrule the objection.

A. This instrument was dated March 23, 1951 and was mailed to Mr. Aiken on or about that date and it shows—you want me to——

Q. Yes, what are the charges that are shown to be due for the O & M charges?

A. It shows the principal on lease 629 as \$2,722.50 [118] plus interest to April 30, 1951 of \$608.03, for a total of \$3,330.53. Page 2 of the exhibit was mailed on the same date and shows principal due of \$370.00 and interest to April 30, 1951, of \$40.70, with the total of \$410.70 due on April 30, 1956.

Q. Mr. Spencer, do your records reveal whether or not this sum or any sum has been paid for the O & M charges?

Mr. Julius Wuerthner: That is objected to because that is asking him about certain letters that we have no opportunity to examine the witness about on cross examination.

Mr. Galles: You must have misunderstood; I asked if his records showed this amount or any amount had been paid?

(Testimony of Charles S. Spencer.)

Mr. Julius Wuerthner: We object unless the records are in court so that we can cross examine him on them.

The Court: You can ask him if he examined the records to see whether any payment has been made.

Q. Did you examine the records?

A. I inquired from the only two collector agents we have who receive this money and they said there have been no payments made.

Mr. Julius Wuerthner: Now we move his answer be stricken as hearsay.

The Court: Yes, it is hearsay.

The Court: Have you looked into the records yourself and gone into the various accounts to see whether there is [119] any evidence of payment ever being made?

A. No, I haven't.

Mr. Galles: You may examine.

Mr. Galles: Could I ask one question or two more?

The Court: Yes.

Q. Mr. Spencer, you have the records and files available to you here in the courtroom here in Great Falls from which you can make an examination to determine whether or not payment has been made?

A. Yes, sir.

Q. Can you do that now?

A. They are in the back of my car; it is the water users ledger; it is in the back of my car just across the street. It is an immense book.

The Court: We won't finish tonight and he can

(Testimony of Charles S. Spencer.)

do that between now and tomorrow morning and you can bring that question up again if you want to.

Mr. Galles: That is all.

Cross Examination

Q. (By Mr. Wuertner): Now as I understand it, Mr. Spencer, you examined this Defendant's Exhibit 7 and these statements which you have testified to? [120] A. That is right.

Q. Do you know whether or not the defendant received these statements Plaintiff's Exhibits 8 and 9? A. No.

Q. You don't know whether or not they were sent by registered mail?

A. I question that they were; I do not know.

Q. You think they were sent through ordinary mail? A. Yes, sir.

Q. Now according to the terminology which appears in both exhibits 8 and 9 it states that, "According to the provisions of your lease(s)—" do you see that language appearing thereon?

A. I would have to re-examine the leases.

Q. I am asking you if you find the language appearing on this exhibit which reads: "According to the provisions of your lease indicated below, the following O & M charges are due and unpaid." Do you find that language there?

A. In this?

Q. Yes. A. Yes.

Q. You find that in exhibits 8 and 9?

A. Yes.

(Testimony of Charles S. Spencer.)

Q. Now I am handing you Plaintiff's Exhibit C and Plaintiff's Exhibit B, which are true copies of the leases [121] indicated on Plaintiff's Exhibits 8 and 9, which you are holding, and ask you to examine them and tell the court whether or not there are any provisions in there which provide for the payment of O & M charges?

Mr. Cyr: Your Honor, counsel has been making this same inquiry and I don't want to delay this but I object to this question on the grounds the instruments referred to have been admitted in the pleadings by counsel for the defendant and they are part of the court records and speak for themselves. Whether he can see it there or not is immaterial. One of the issues in this case is reformation of those instruments. Now obviously if we ask to reform this witness can't advise the court if he has no personal knowledge because he was not in this position until '55.

Mr. Wuerthner: May it please the court, we hope we have a chance to go into the terminology appearing in those two exhibits which indicates those charges were assessed, what basis or reason they were, and further now this gentleman has testified that those two exhibits are official records of his office, but we hope now we have a chance to go behind that and see the basis of these charges which he says are due and owing.

The Court: According to the provisions of the lease. Well is he familiar with these leases; has he ever read them or ever seen them before? [122]

(Testimony of Charles S. Spencer.)

Mr. Wuerthner: I will find out, your Honor.

Q. Mr. Spencer, are you familiar with leases of this type? A. Yes, sir.

Q. And you are familiar with reference to O & M charges? A. Yes.

Q. And I believe you stated you have a ledger showing O & M charges? A. Yes, sir.

Q. Then I believe you are familiar with leases which you have in your hand with reference to any charge that may appear thereon or any reference to charges? A. In general.

Q. Well then will you examine those two leases and tell the court whether or not you find any reference or any obligation on the defendant to pay these charges?

A. Yes, the lease F 761, paragraph 6, "Operation and Maintenance. It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties, accruing against the above-described land under irrigation, pursuant to the existing or future orders of the Secretary of the Interior (Title 25-Indians, CFR, part 130)." It is also typed in the bottom of the lease.

Q. On the same lease, that is 761? [123]

Q. And that is Exhibit D? (attached to complaint).

A. Exhibit D. I will read the entire statement:

"All land to be farmed as irrigated farm land on a crop rotation basis. This land must consist of at

(Testimony of Charles S. Spencer.)

least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown by August 20th in time to permit sufficient growth for winter cover. All farm lands to be farmed in a husband-like manner on a crop rotation basis, with at least one leguminous crop on all five-year leases. No land to remain fallow over the winter. Irrigation water assessment to be paid——

Q. And read on the reverse side at the top?

A. "at the same time rental is paid."

Q. Now did you find any reference in Exhibit C with reference to the payment of O & M charges?

A. Except that statement which states:

"If it is shown to be necessary to practice weed eradication for one year only out of 5, water charges will not be required for that year if water is not used."

I would say only by inference.

Q. No direct agreement by the defendant to pay O & M charges?

A. Not in the lease.

Q. May I call your attention to whether or not paragraph 6 of Exhibit D had reference to O & M charges which you read to the court appears in the other lease?

A. It does not.

Q. It has been dealeated? [124]

A. No, it hasn't been deleted.

Q. Will you explain why that is not included?

A. That is a '29 form that was used for some reason unknown to me in lieu of the proper form

(Testimony of Charles S. Spencer.)

that should have been used at that time and which was used in the other lease.

Mr. Wuerthner: That is all.

Mr. Cyr: We offer in evidence Plaintiff's Exhibit 10 which is a certified copy of the originals in the office of the Bureau of Indian Affairs under the seal of the Commissioner of the Bureau of Indian Affairs certified by the executive officer thereof. This is offered for the purpose of showing that demand was previously made upon this defendant as a result of correspondence which the original of which was signed by the attorneys for the defendant in this case.

Mr. Wuerthner: To the introduction into evidence of Plaintiff's Exhibit 10 the defendant objects on the ground and for the reason no sufficient foundation has been laid for the introduction into evidence of this document. There has been nobody to properly identify it under oath, and on the further grounds that this instrument does not appear to be an exemplification as we believe is required on instruments of this type, and that they are not the originals of the documents which are contained therein. [125]

Mr. Cyr: Your Honor, the documents are under the seal of the Commissioner of the Bureau of Indian affairs, certified to be true copies of the originals which are on file in his office. I don't believe the rule or statute requires they be exemplified, the seal takes care of the oath and I think they are admissible, your Honor, for the purpose. I think

there is no question of their admissibility and I think they are material to show that a demand has previously been made.

The Court: Well, gentlemen, I think this correspondence has a material bearing on the issues of the case and properly authenticated and I will overrule the objection and it will be admitted in evidence.

Mr. Cyr: Your Honor, with the same reservation that we would like to recall Mr. Spencer after he has had an opportunity to examine his records to determine whether or not these assessments have been paid, we rest.

Mr. Julius Wuerthner: We can save just a little bit of time, your Honor——

The Court: You can have a ten minute recess if you want it.

Mr. Julius Wuerthner: I don't believe it will take that much time, your Honor, because there is something in the pretrial record here, your Honor.

Mr. Cyr: Counsel for the defendant has agreed that [126] they will stipulate that the O & M charges to which the witness Spencer testified have not been paid by the defendant Aiken.

Mr. Julius Wuerthner: But that the rentals had been paid other than that.

The Court: Very well, let the record show that.

Mr. Cyr: And it won't be necessary to recall Mr. Spencer, and the Government rests.

Mr. John Wuerthner: At this time, your Honor, we have a motion I would like to make.

The Court: Very well.

Mr. John Wuerthner: The defendant moves to dismiss the plaintiff's first cause of action on the ground and for the reason that the Government has failed to sustain the burden of proof of its allegations, and furthermore have failed to sustain the burden of proving by a preponderance of the evidence or any evidence whatsoever that by mutual mistake and inadvertence of the parties to the lease marked Exhibit C that there was an agreement on the part of the defendant to pay O & M charges under that lease. Now our motion to dismiss is also directed to the second cause of action on the ground that the Government has failed to sustain the burden of proof by the preponderance of the evidence the allegations of that cause of action. Does the court wish argument on it? [127]

The Court: Well, no, we won't have any argument on it now. The court will take that under consideration and you may proceed with the case. Of course that would be your final motion anyhow after you concluded the case very likely.

Mr. John Wuerthner: May it please the court, at this time the defendant would like to make a brief statement of what we expect to prove as a defense in this matter.

We expect to prove that the land involved in these two leases is not susceptible of irrigation and we are not going to prove it by technical means but we will prove it by those who live in the locality and have lived there for many years and know this land.

We will show that this land has been strip-farmed

for many years last past, and also the fact when it is strip-farmed it does not permit of any irrigation.

We will also show that the defendant had a lease on the same land for five years prior to the 44 lease and during that period there was absolutely no mention made of any O & M charges and the defendant was under the understanding this was dry-land and was not irrigable.

The defendant will also prove that at the time he entered into the 44 lease that he was not aware of the fact that there were any O & M charges [128] that were going to be assessed to him; that there was no mutual mistake on his part; that he entered into this lease with the impression he would have it on the same terms he had it previously, and that it would be farmed as drylands.

The evidence will show the land was broken in 33 and after that time it began to wash and wind erosion set in, and he will show the only practical method of farming was by the strip method and we believe by his testimony we will show the Government is not entitled to reform the lease of '44.

We will further show with reference to the other lease that there were no ditches available to him to irrigate the land covered by the lease of 46.

We will show that the ditches that existed with reference to that land in '46 could not possibly be used for irrigation inasmuch as another party moved into the lands formerly occupied by the defendant under the '44 lease and it was thereafter impossible for him to dig a ditch across those lands he no longer leased during the last two years of his

lease, and I believe when our evidence is in the court will be justified in dismissing the complaint of the Government as to both causes of action.

The Court: You may proceed, gentlemen. Call your first witness. [129]

HENRY L. HENNEMAN

was called by defendant and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. John Wuerthner): State your name, please. A. Henry L. Henneman.

Q. Mr. Henneman, are you here in response to a subpoena for the defendant? A. I am.

Q. Are you acquainted with the defendant Robert Aiken? A. I am.

Q. How long have you known him?

A. Probably 20 years.

Q. You have heard the testimony previously given in this case? A. I did, sir.

Q. Are you acquainted with the land in question, the lands formerly leased to Mr. Aiken?

A. Very well acquainted with part of it.

Q. Will you tell the court what that acquaintanceship consisted of?

A. It consists of my farming it for 7 years since Mr. Aiken had it.

Q. You say you have farmed this land for the last 7 years? [130]

A. The last seven years, yes, sir.

Q. Did you farm all of the land in question in this case? A. No, sir.

(Testimony of Henry L. Henneman.)

Q. How much land did you farm, referring to Plaintiff's Exhibit 1 could you estimate how much less of the land in the green shading that you are farming?

A. How much less is in the green shading than what I farm?

Q. Yes, you can give it by the acre if you want, so many 40's? A. I would say six 40's.

Q. You farmed six 40's less than Mr. Aiken in that area? A. Yes, sir.

Q. Did you have a lease on the area shown in the red shaded portion? A. Yes, sir.

Q. You have leased all of that?

A. Yes, sir.

Q. Now are you acquainted with the ditches on this land as they existed in '44?

A. On this particular land?

Q. Yes. A. Not in '44.

Q. Were you there in '44? A. No, sir.

Q. When did you first come upon this land?

A. '49.

Q. And did you lease in that area prior to that time? A. I did, sir.

Q. Whereabouts?

A. I lived right in Valier but I farmed on the reservation prior to that time that I started farming this land.

Q. How long have you farmed in that vicinity?

A. Fifteen years.

Q. Now handing you Plaintiff's Exhibit 1 I will

(Testimony of Henry L. Henneman.)

ask if you recognize the blue and red lines that appear thereon? A. These lines here?

Q. Yes. A. I do, sir.

Q. What are those lines?

A. They represent the ditches leading to these lands.

Q. Now were you acquainted from the years '44 to '49 with the ditches in that area?

A. Not up to this area, no, sir.

Q. Were you ever over this land prior to '49 when you took a lease? A. No.

Q. You don't know anything about what ditches were in there prior to that time? A. No, sir.

Q. Does this map reflect the situation with regard to [132] the ditches as of '49 when you took this lease?

A. Yes, sir, up to a certain point.

Q. Now referring to point 1 in red pencil does that represent the end of the ditch in '49?

A. Yes, it does.

Q. Referring to blue 1 does that represent the end of that ditch?

A. That ditch I wouldn't know about. I am not acquainted with that one.

Q. Referring you to blue 4 as appears on the Exhibit does that represent the terminal point of that ditch in '49 so far as you know?

A. Yes, sir.

Q. That is approximately correct?

A. Approximately, yes.

Q. Now referring to blue 3 does that terminal

(Testimony of Henry L. Henneman.)

point represent approximately the end of that ditch in '49? A. That is this circle here.

Q. Yes. A. Yes, sir.

Q. And referring to red 6 to red 8 which ditch has been scratched off does that represent a ditch or was that ditch in there in '49 when you took over this land?

A. No, that ditch was not there that I recall.

Q. The terminal point of that ditch would then end at [133] what point?

A. I don't know if that ditch was in there in '49.

Q. You are referring to the ditch between red 6 and red 8?

A. Not in '49 to my knowledge that ditch was not there at all.

Q. Now referring again to Plaintiff's Exhibit 1 can you tell us about those three ditches you know about whether or not since '49 you have seen any water in them?

Mr. Cyr: To which we object on the ground it is immaterial whether there has been any since '49.

Mr. Wuerthner: I believe we can go into whether or not they were capable of carrying water. The Government went back '31 in their ditches.

The Court: Well let him answer; maybe it will have some bearing on it.

A. I have seen water up to this point here.

Q. Which point are you indicating?

A. Right here.

Q. Up to point red 3 you have seen water that far? A. Yes, sir.

(Testimony of Henry L. Henneman.)

The Court: On what time, when?

Q. When did you see water in that ditch approximately?

A. Nearly every year that I have been out there.

Q. And was that water available for use by you?

A. No, sir. [134]

Q. What was the purpose of putting the water up there, if you know?

Mr. Cyr: We object, it calls for a conclusion of the witness.

Mr. Wuerthner: He can testify if he knows.

Mr. Cyr: No proper foundation.

The Court: Does he know; what year is he talking about?

Mr. Wuerthner: He has testified there has been water in that ditch every year?

The Court: What years?

Q. What years are you referring to? Every year that you have had the lease?

A. Yes, sir, every year since '49 that I have been farming out in that neighborhood.

Q. And have you used any of that water since you have had the lease? A. No.

Q. Have you had any need for it?

A. No.

Q. But the water has been up to this point represented by red 3? A. Yes, sir.

Q. Is that water dumped or does it stay in the ditch or what happens to it?

A. I believe there is a canal over here to the gully. [135]

(Testimony of Henry L. Henneman.)

A. That is rock gully and the water drains into the gully? A. That is right.

Q. Now referring to the ditch from red 3 to red 1 has there ever been water in any portion of that ditch since your lease?

A. Not that I have seen.

Q. You have never seen any? A. No, sir.

Q. Now, Mr. Henneman, since '49 when you leased this ground have you paid any O & M charges? A. One year, sir.

Q. What year was that? A. '55.

Q. What was the term of your last lease?

A. Started in '49, lease commencing in '49.

Q. Until what year?

A. Until '54, through '54.

Q. Do you have a copy of that lease?

A. I have.

Q. Handing you what has been marked defendant's proposed Exhibit 11 I will ask you if you can identify it? A. Yes, sir.

Q. Will you identify it?

A. This is the lease. This is my lease copy that I was [136] issued from December 1st, 1949 through December 31, 1953.

Q. And this lease covers the same land previously leased to Mr. Aiken? A. Part of it.

Q. All of the land contained in this lease is a portion of the land leased by Mr. Aiken?

A. That is right.

Q. And referring you to the last page of this exhibit does your signature appear thereon?

(Testimony of Henry L. Henneman.)

A. It does, sir.

Q. And there are other figures appearing thereon? A. That is right.

Mr. Wuerthner: We offer into evidence for illustrative purposes only defendant's proposed Exhibit 11.

Mr. Cyr: Your Honor, we object on the grounds it is not material; it is not between the same parties; this is between Minnie Foundagun as per authority on file signed by the Superintendent. I suppose it is an allotment. There is no proper foundation in that it is not shown that all of the lands included in the prior lease was included in this, so it is not pertinent to the issues in this case.

The Court: What would it illustrate, if anything?

Mr. Wuerthner: First of all, your Honor, he has testified all of the land covered by that lease is included as portion of the land they are suing on. We will prove [137] by that instrument or attempt to show the intention of the parties of the indifference of the Government with regard to O & M charges both as to after the lease in question and before the lease in question. We will have testimony showing what the policy was prior to this time and also this goes to our denial there was mutual mistake.

The Court: As to these particular lands?

Mr. Wuerthner: Yes, sir.

Mr. Cyr: In that regard this is only a part of the holdings under the regulations; as I under-

(Testimony of Henry L. Henneman.)

stand them the land must be subject to irrigation and the water brought to a point on the land. Now there has been no showing the water was brought to this point of this land as in the case in issue.

Mr. Wuerthner: He hasn't testified as to the exhibit; we are merely offering it.

Mr. Cyr: That is because the similarity isn't shown between this and the issues in the case.

Mr. Wuerthner: This is offered only for the purpose of showing relationship of O & M charges called for here or not called for.

The Court: What part of the lands are not contained in this lease, how much?

Mr. Wuerthner: I believe you testified, Mr. Henneman, there were six 40 acre tracts. [138]

The Court: 240 acres of the land contained here, and what land was not? Was it irrigable land or non-irrigable land or were there any ditches on it? Is that the principal land in question under this case?

Mr. Cyr: This involves only the north half of section 30, your Honor.

The Court: I think perhaps you might be able to lay a foundation by going into that proposition so that it might illustrate something that might be material. You can find out the connection and how it is related, that this lease included all of the defendant's lease and it might show something for illustrative purposes.

Mr. Wuerthner: Very well, your Honor.

Q. Mr. Henneman, would you step down here?

(Testimony of Henry L. Henneman.)

Mr. Henneman, I am referring to Plaintiff's Exhibit 1 and I will ask you to put a circle around the X appearing in those 40 acre tracts which will indicate the land covered by the lease, Defendant's proposed Exhibit 11?

A. The land that is in this.

Q. The land that is in this lease that you have; will you please circle the Xs in those 40's? Now you have placed circles around the Xs representing the acreage covered by the lease which you had between 49 and 54, is that correct?

A. That is correct.

Q. Do you have a lease on this same land now?

A. I do, sir.

Q. In '49 did you lease any other land that was contained in the lease that you have testified to?

A. I did.

Q. Do you have that lease with you?

A. No, I haven't.

Q. Was that land covered by the land leased formerly by Mr. Aiken?

A. Part of it was, yes, sir.

Q. Can you indicate on this map the portion which you leased that is not shown by our Exhibit 11? A. How, sir?

The Court: That is the land that was under lease to Mr. Aiken?

Mr. Wuerthner: Which he leased in '49.

The Court: The land which was leased to Mr. Aiken which was not included in his lease?

(Testimony of Henry L. Henneman.)

Mr. Wuerthner: Yes, we will indicate that, your Honor.

Q. Now will you indicate the other land you held which Mr. Aiken formerly held by a square around the X in pen?

Q. Now, Mr. Henneman, on Plaintiff's Exhibit 1 you have indicated by a circle around the X the various 40 acre tracts which you leased from the Indian Council in '49, is that correct? [140]

A. That is correct.

Q. And that is represented by our proposed Exhibit 11? A. That is correct.

Q. And you have indicated with a square around the X those 40 acre tracts which you also leased from the reservation in '49?

A. That is correct.

Q. And they were also leased formerly by Mr. Aiken? A. Yes.

Q. And you took over from him in other words on these you have indicated? A. Yes.

The Court: Has he indicated the land formerly leased by Mr. Aiken that he didn't lease?

Mr. Wuerthner: Yes, he has. Do you want to see it?

Mr. Cyr: Yes.

The Court: No, I don't care to see it. I will look at it later.

Q. Now as you previously testified this Exhibit 11 is a lease covering a portion of the lands leased by Mr. Aiken which you took over from him, is that correct? A. That is correct.

(Testimony of Henry L. Henneman.)

Q. And the other land which you did not have a lease representing do you know whether or not the terms contained in that lease are the same as the lease [141] which you have produced?

A. They are not.

Q. They are not the same? A. No.

Q. Can you tell us what differences were in the other lease?

A. The other lease was an irrigated lease.

Q. A purely irrigation lease?

A. Yes, sir, and I have always ordered water on it.

Q. And that is the land which you have indicated by a square around the X?

A. There is part of that that is irrigated.

Q. And there is a portion of the other lease which is not subject to irrigation?

A. That is right.

Q. Now with reference to the area which you have drawn a circle around represented by the exhibit 11 is that an irrigation lease?

A. It is now.

Q. Well I am talking about in '49 at the time that lease was executed? A. No, it was not.

Q. And there were no O & M charges payable under that lease? A. No, sir. [142]

Q. Were there any assessments against you?

A. No, sir.

Q. Now with regard to the land comprising this lease, Defendant's Exhibit 11, will you tell the court the nature of that land?

(Testimony of Henry L. Henneman.)

A. There is quite a ridge runs the full length of the land and it slopes both ways from the ridge starting with quite steep and then leveling off.

The Court: That is the land that was not included in this lease but was included in the defendant's lease?

A. That is Exhibit No. 11.

Mr. Wuerthner: No, sir, he is describing his land which the defendant also leased; they both leased the same land.

The Court: Yes.

Q. Will you further describe this land with respect to the soil?

A. I would say it was quite a light sandy like soil which is very subject to washing or blowing and therefore it always has been farmed as strip land.

Q. Why has it been farmed as strip land rather than as irrigated land?

A. Just because I would say it is not suitable to be irrigated.

Q. Would it be subject to erosion?

A. Very much so. [143]

Q. Has that land eroded?

A. Very much, yes, it has.

Q. And does this strip farming method stop the erosion? A. It does.

Mr. Wuerthner: We will reoffer defendant's proposed Exhibit 11 for illustrative purposes only.

The Court: Have you described the lands that

(Testimony of Henry L. Henneman.)

was not included in this witness' lease that formerly was a part of the lease of the defendant?

Mr. Wuerthner: All right.

Q. Now referring again to Plaintiff's Exhibit 11 and referring specifically to the green shaded area which you have not made any mark on, now that area represents other land leased to the defendant, what have you to say with respect to that land whether or not it is irrigable or should be farmed as dry land?

Mr. Cyr: To which we will object on the ground no proper foundation, this witness hasn't been properly qualified as an expert to testify whether or not it should be farmed or not.

Mr. Wuerthner: Very well, I will lay a foundation.

Q. Mr. Henneman, are you acquainted with the other area shaded in the green which you have not marked? A. No, I am not.

Q. Do you know anything about that land on the other [144] side of the gully that is shown on the map? A. No, I am not.

Q. Have you ever been to that part of this area?

A. I would say no.

Q. And you have only farmed the 40's as shown by the circles and the squares?

A. Close to that area.

Q. Well have you ever looked that area over? They are adjacent, are they not? I am referring to the 40 running along the gully represented here by the map which is adjacent, one 40 which is the

(Testimony of Henry L. Henneman.)

northwest quarter of the northeast quarter of section 30?

A. That is a large gully running through there which you can't ride through with a pickup and for that reason I have never been over that side of that gully.

Q. Now with reference to the land appearing in the north half of the southwest quarter of section 25, as shown in the green shaded portion, are you familiar with that land?

A. Some, sir, yes, sir.

Q. You are farming one of those 40's?

A. Yes, sir.

Q. Are you familiar with the other 40?

A. Yes, it joins me right there.

Q. Now are you acquainted with the 40's that join on the west? [145]

A. Well this end, sir.

Q. Do you know the character of this land as to what the type soil is and the terrain type?

A. It would be pretty much the same as this on further east.

Q. Would all of this land in the green be about the same type land?

A. I would say it was.

Q. What do you know about the land represented by the red shaded portion, are you acquainted with that land?

A. Part of this is farm land and it would be practically the same soil as to but a little heavier.

(Testimony of Henry L. Henneman.)

Q. Do you know whether or not the portion shaded in red is susceptible of irrigation?

A. I don't know, sir.

Mr. Cyr: To which we will object on the grounds it is not material and further I will object to all this testimony on the ground it is not material; the law provides whether or not the land is irrigable.

Mr. Wuerthner: I will object to that statement.

Mr. Cyr: The regulations will provide what assessments are to be made and on which land. It is not for each individual owner within the area or lessee to decide for himself whether the land is or is not irrigable.

The Court: He hasn't qualified as an expert on what land [146] is irrigable.

Mr. Cyr: No, your Honor, but I wish to point out to the court the position of the Government. It does not make any difference whether he is farming or not, the law provides as pointed out by the witness before that all of this land is irrigable except that which is designated non-irrigable. This man had a lease which was a dryland lease which was a variation of the law and it does not make any difference whether he had another or not.

The Court: What I was trying to find out what he knew about the 240 acres that was included in the defendant's lease and included in his. That is all I was trying to find out, what he knew about it, what the character of the land was, the soil, whether there were irrigation ditches on it.

(Testimony of Henry L. Henneman.)

Q. Mr. Henneman, do you know anything about the land shaded in green and red that you have not leased with respect to irrigation ditches?

A. I am afraid I don't, sir.

The Court: Well it seems to me on the question of admissibility it is rather remote all right. Apparently for purpose of illustrating a policy, a rental policy that the defendant claims has taken place before and since the leasing to the defendant. So far as I can see it seems to me it is rather remote on the question of the policy; [147] however, it might have some bearing and I will allow him to put it in and we can consider it and see whether it has or not. It seems rather remote to the court at this time.

Q. Mr. Henneman, did you hear testimony this morning from a Government witness to the effect that the land shaded in red was irrigable from this terminal shown at No. 3, do you recall that testimony? A. I am afraid I don't.

Q. The time that you took this lease on the land described as the south half of the southeast quarter of section 30 isn't it a fact that the defendant still had a lease on a portion of the land involved?

A. That is right.

Q. Now will you show us which portion he still had a lease on? A. It was these two.

Q. In other words, the defendant had a lease on the south half of the southeast quarter of section 30, and he was farming while you had a lease on those 40's shown as the north half of the southeast

(Testimony of Henry L. Henneman.)

quarter and the northeast quarter of the southwest quarter of section 30? A. That is right, sir.

Q. Now do you know whether or not this ditch shown by blue pencil 3 ends, is that the correct terminal point? [148]

A. Yes, that is awful close.

Q. Now in order for the defendant to get water on the south half of the southeast quarter of section 30 it would have been necessary therefore for him to construct a ditch across land leased by you which he had previously leased?

Mr. Cyr: It calls for a conclusion of the witness; we object on the ground no foundation laid for this witness to express an opinion for necessity of constructing a ditch at any point.

Mr. Wuerthner: The defendant can give an opinion as to the route of the ditch if there was one to be constructed. The Government has testified——

The Court: You can inquire if a ditch were constructed the defendant would have to cross his land.

Mr. Wuerthner: All right, sir.

Q. Getting back to my original question, Mr. Henneman, if a ditch were to be constructed from the terminal point blue 3 to the land still owned by the defendant after '49 would the ditch have had to cross land leased by you? A. It would have.

Q. What would be the other alternative if a ditch were to be constructed?

A. To come from this ditch.

(Testimony of Henry L. Henneman.)

Q. You are pointing now to blue No. 4?

A. Blue No. 4. [149]

Q. And to extend blue 4 to the land described as south half of the southeast quarter of section 30?

A. That is right.

Q. Would it be possible to extend ditch blue 3, tracing that line, without crossing land leased by you?

A. I believe not.

Q. Why not?

A. That is the way the water would have to run from this ditch.

Q. It would have to run in an easterly direction?

A. That is right.

Q. And it would be impossible in your estimation for water to irrigate the land located in the south half of the southeast quarter of section 30 from terminal point blue 3?

A. I believe it would.

The Court: I think we had better suspend here.

(5:00 P.M. January 18, 1956. Adjourned until 10:00 A.M.) [150]

Court resumed, pursuant to adjournment, at 10:00 A.M. on January 19, 1956, at which time all parties and counsel were present.

The Court: You may proceed with the trial of the case. Call your next witness.

Mr. Wuerthner: Your Honor, I believe I was through with Mr. Henneman. I would like to call Mr. Henneman back to the stand with the court's permission.

The Court: Very well.

HENRY L. HENNEMAN

resumed the stand and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Wuerthner): Mr. Henneman, handing you Plaintiff's Exhibit 1 so that you may refer to it in your testimony, I will ask you if you held a lease from the Government on a portion of the land colored red in the exhibit? A. Yes, I do.

Q. You heard Mr. Anspach's testimony yesterday that a certain part of that land is grazing land and therefore is non-irrigable, is that correct?

A. That is correct.

Q. The lease which you hold on this land is described as the south half of the southeasterly quarter of section 30, [151] is that correct?

A. Yes, sir.

Q. There's those two 40 acre tracts?

A. That is right.

Q. And those two tracts you heard Mr. Anspach testify are irrigable, is that correct?

A. That is correct.

Q. Do you hold a lease on those two 40's at the present time? A. I do.

Q. And did you hold a lease on those two 40's in '49? A. No, sir, not in '49.

Q. Well did you own a lease after Mr. Aiken's lease ran out? A. I did.

Q. You were the next lessee?

A. That is right.

Q. Now have you paid any O & M charges for water which you have or have not used on those

(Testimony of Henry L. Henneman.)

two 40 acre tracts? A. No, sir, I have not.

Q. You have never paid any O & M charges since you have leased those lands? A. No.

Q. Did your lease that you executed in 49 call for O & M charges? [152]

A. That lease was in '51, sir.

Q. I beg your pardon. In '51 did that lease call for O & M charges? A. Yes, it did.

Q. Were any O & M charges assessed against you? A. They were.

Q. And did you pay them? A. I did.

Q. Did you receive any water on those two tracts? A. No, I did not.

Q. Do you have a lease at the present time on those two tracts? A. I have.

Q. And does your present lease call for O & M charges?

A. The lease does, yes, but the O & M charges were taken off this lease?

Q. They were taken off? A. Yes, sir.

Q. What do you mean by that?

A. Well I asked for a recheck, it looked to me like this land would be hard to irrigate so I asked for a check. I believe it was Mr. Kuka I asked first and he said it could be arranged.

Q. You mean a survey?

A. Survey to check, which they did and they mailed me [153] back my check of \$133.20 which I had paid as water charge.

Q. You had paid that for water charges in advance?

(Testimony of Henry L. Henneman.)

A. In advance for '51 and they said that on this land due to the cost of the irrigation operation at that time they were willing to take that portion of my lease out as dryland.

Q. In other words, the Government did not require you to pay O & M charges of the two 40 acre tracts? A. No.

Q. And those are the tracts described in Mr. Aiken's lease at the present time? A. Yes.

Q. And that is known as the 46 lease which Mr. Aiken had? A. Yes.

Q. And the other tracts involved which are shaded in red are not farming tracts, is that correct? A. That is correct.

Q. Now, Mr. Henneman, referring you to Defendant's Exhibit 11 which is, your lease covered a portion of the land leased by Mr. Aiken under the what is known here as the 44 lease, I will ask you whether or not you paid O & M charges under this lease? You may refer to the lease if you wish?

A. No, not under this lease I never paid.

Q. Were any O & M charges payable under that lease? A. No. [154]

Q. Was there any provision in that lease requiring the payment of O & M charges?

A. The only provision there was that if and when irrigation was established I was then to pay O & M charges.

The Court: I didn't hear that.

A. The provision in the lease was if and when

(Testimony of Henry L. Henneman.)

irrigation was established I was to pay O & M charges which was never done during my lease.

Q. Now you are referring to the land involved in the '44 lease which Mr. Aiken previously held?

A. Yes, that is right.

Q. And are you referring when you say no O & M charges were paid to the terminology of the lease?

A. That is right.

Q. And you were referring then to the typewritten portion of the lease which states that rentals are to be increased, would you kindly read that to the court?

A. "Rentals to be increased 75c per acre on irrigated lands when irrigation service is established; lessee to notify the Blackfeet Indian Office immediately when such service is furnished."

Q. And what is the date of that lease?

A. December 1st, 1949.

Q. So that as of that date by the terms of this lease there had been no irrigation service established on the tracts [155] which you have indicated on the Plaintiff's Exhibit 1 by a circle around the X and a square around the X?

A. That is right.

Mr. Wuerthner: I believe that is all.

Cross Examination

Q. (By Mr. Cyr): I would just like to clear up a few things, Mr. Henneman. On which portion of this green marked portion of Exhibit 1 do you now pay O & M charges?

(Testimony of Henry L. Henneman.)

A. It would be on these 320 acres here.

Q. The north half of section 30?

A. That is right.

Q. Do you have a lease on the north half of the southeast and on the northeast of the southwest of section 30? A. I do.

Q. And you have not been charged any O & M charges on that? A. I pay water on that.

Q. You pay water on what?

A. That 120, I pay water on that.

Q. And do you now have on lease the south half of the southeasterly quarter of section 30?

A. I do. [156]

Q. And does the lease provide for O & M charges covering that? A. No.

Q. Is that the portion for which this check was delivered to the project?

A. My check was refunded back to me; that is the portion.

Q. That portion? A. Yes.

Q. Now to whom did you tender that check?

A. To this office there at the irrigation office at Browning.

Q. Well who did you physically hand the check to, do you remember? A. No, I don't.

Q. Do you have this check?

A. Not with me, no.

A. That I can't say; I think I do but I can't truthfully say that I have.

Q. You don't know whether you do or not?

A. No.

(Testimony of Henry L. Henneman.)

Q. The check was not cashed? A. No.

Q. How did you receive the check, how was it returned to you? [157]

A. It was returned by mail with a little notice along with it telling me that.

Q. And do you have that notice?

A. Not with me, no.

Q. By whom was the notice signed?

A. By Mr. Stout.

Q. And when was this? A. In '51.

Q. How much was the check? A. \$133.20.

Q. Have you looked at this check recently?

A. No, I haven't.

Q. How do you recall that figure so accurately?

A. It is on this, the figure is on the letter I received from Mr. Stout.

Q. And you have referred to that letter recently? A. I have.

Q. Do you have that letter with you?

A. No, I haven't.

Q. Where is the letter?

A. It is in my filings at home.

Q. Was this a mimeograph letter that you received?

A. Well, no, I don't believe it was.

Q. Was it typewritten? A. Typewritten.

Q. Do you remember the date on the letter?

A. No, I don't.

Q. Was it '51? A. It was in '51.

Q. And signed by Mark Stout? A. Yes.

(Testimony of Henry L. Henneman.)

Mr. Cyr: It will just take a moment, your Honor, to see if we can find it.

Q. Now, Mr. Henneman, the notice stated for this return of this check and the failure to assess you was because the ditch had filed with dirt in the prior year, isn't that true?

A. That was not stated in the letter, no.

Q. But do you know that to be true that the ditch had been blocked full of dirt and had to be cleared out?

A. Well there was no ditch to that land.

Q. Well where the ditch had been it had been filled with dirt, had it not? A. Yes.

Q. As a result of blowing? A. Yes.

Q. And that had occurred prior to the time of this, the time this check was returned to you, had it not? A. That is right.

Q. And that is the reason that you were to pay O & M [159] charges as soon as they made that point of delivery available again, isn't that true?

A. That is true.

Mr. Cyr: That is all.

Redirect Examination

Q. (By Mr. Wuerthner): Mr. Henneman, when did this ditch fill with dirt?

A. Well it was before my time there.

Q. It was full at the time you took over the lease, is that correct? A. Yes.

Q. And what is the present condition of that ditch? A. It is still full of dirt.

(Testimony of Henry L. Henneman.)

Q. Do you know who made this survey that you have testified to?

A. Frank Kuka and I believe Mr. Stout.

Q. Who is Mr. Stout?

A. He is the water engineer, he is classed as, at Browning.

Mr. Wuerthner: That is all.

Mr. Cyr: That is all. [160]

Mr. Wuerthner: Call Mr. Kuka.

FRANK KUKA

resumed the stand and testified as follows:

Direct Examination

Q. (By Mr. Wuerthner): Your name is Frank Kuka?

A. Yes, sir.

Q. And you have previously testified in this matter on behalf of the Government?

A. Yes, sir.

Q. I will ask you, Mr. Kuka, if you heard Mr. Henneman refer to a survey which you and Mr. Stout made of a certain ditch or ditches adjacent to the property here in dispute?

A. We made a survey to the land. It wasn't for a ditch; it was to check the land to see if water would be available upon it.

Q. And did this survey only affect the land which is described in this action under the 46 lease which Mr. Aiken formerly had?

A. I don't understand the question.

Q. I will withdraw that question. You may

(Testimony of Frank Kuka.)

refer to Plaintiff's Exhibit 1 here. Did your survey relate to the area shaded in red on Plaintiff's Exhibit 1? A. Yes, I believe it did. [161]

Q. And did it relate to the possibility of irrigating a certain portion of that red shaded area?

A. Yes, sir.

Q. And that portion is described as the south half of the southeast quarter of section 30?

A. Well it is southeast of the southeast quarter of section 30.

Q. Southeast quarter of the southeast quarter?

A. Yes.

Q. Isn't it a fact that both the southeast quarter of section 30 and also the southeast quarter of the southeast quarter of section 30 were irrigable?

A. They were.

Q. And you made this survey with relation to those two 40 acre tracts?

A. Let me explain that it was the summer following Mr. Henneman had done had blowed in between those lines and it caused a raise in the ground where a fence stood between. It was originally fenced off at one time and in order to get through that he couldn't get the water through there until we check it to tell where to go through with it.

Q. With relation to the surveys which ditch are you referring to now was blown over with dirt?

A. The ditch wasn't blown over with dirt. We had established our point there at the high point.— [162]

(Testimony of Frank Kuka.)

Q. You are referring to red or blue 4?

A. That is right.

Q. As terminus point of the ditch?

A. That is right.

Q. And was that ditch the one that had filled with dirt?

A. No, it hadn't filled; that ditch was okay to here.

Q. To red 4? A. Yes.

Q. But the portion beyond that had filled with dirt?

A. That is up to Mr. Henneman; if we deliver to the high point to take it from there on.

Q. I don't believe you understood my question. Read the question.

(Question read.)

A. Well I don't know, that had nothing to do with us.

Q. Didn't you make a survey for Mr. Henneman? A. Yes.

Q. And what did you determine as a result of your survey?

A. Well we determined that it had blown in there.

Q. The soil had moved during the winter.

Q. The soil had eroded? A. Yes.

Q. Does that soil move quite frequently?

A. It does if they block farm.

Q. If they block farm? A. Yes. [163]

Q. And what is the result if they strip farm?

A. That protects it.

(Testimony of Frank Kuka.)

Q. It protects it from eroding? A. Yes.

Q. Did you determine as a result of your survey whether or not the two 40 acre tracts you have been referring to were irrigable or not?

A. They were not at that time.

Q. What time was that survey made?

A. Well it was in I believe 51 but I can't recall the exact time.

Q. Sometime in 51? A. In early spring.

Q. And is that irrigable at the present time if you know? A. I don't think so.

Q. It is not at the present time?

A. I don't think so.

Q. Do you know whether or not it was irrigable prior to 51?

A. Yes, I delivered water there for 51.

Q. When? A. In 36, 7 and 35.

Q. That was prior to the time Mr. Aiken had that lease, is that correct? A. Yes, sir. [164]

Q. And did you deliver it for irrigation purposes? A. I did.

Q. Had there been any irrigation of this two 40 acre tracts since 36 or 37? A. No.

Q. None since then? A. No.

Q. Is it possible to irrigate where you farm by strip method?

A. Well it is not practicable.

Q. Now I believe you testified yesterday to the effect that water had been delivered in the ditches during the time Mr. Aiken had his lease?

A. I have had water up to those points.

(Testimony of Frank Kuka.)

Q. Did you deliver that water at Mr. Aiken's request? A. I did not.

Q. What was the purpose in delivering that water? A. For stock water.

Q. That wasn't for Mr. Aiken's use?

A. That is right.

Q. Isn't it a fact that you delivered water for the request of the users? A. That is right.

Q. And that depends on whether or not water is available? A. That is right. [165]

Q. And whether the ditch will carry water?

A. That is right.

Q. Now will you tell the court where or not any special material was used in constructing these ditches involved in this action? A. By what?

Q. Any non-porous material to hold the water?

A. There was none that I know of.

Q. In other words, the ditches were just dug out of the ground? A. That is right.

Q. But were they maintained?

A. We maintained them from year to year, yes.

Q. Isn't it a fact that many times water was running in portions of the ditches that they would wash and the water would escape into the gullys?

A. There is at times.

Q. But you at no time ever delivered any water at Mr. Aiken's request or for his use?

A. I delivered water to him in 41 and 42.

Q. Did he use it? A. Yes, sir.

Q. Where did he use it?

A. He used it on this tract up here.

(Testimony of Frank Kuka.)

Q. And was that water paid for in advance if you know? [166]

A. I don't know anything about it.

Q. Now you have testified, Mr. Kuka, to the effect that this land has eroded considerably?

A. Yes, sir.

Q. And I believe you testified that it had eroded because of the, well will you tell the court, I don't know whether I asked you or not if you know what causes this erosion?

A. Well I answered that once.

Q. I am sorry.

A. It was due to block farming in there in that area.

Q. To block farming? Do you recall whether or not Mr. Aiken farmed by the block method or strip method?

A. Well, I can't say for sure whether, he did some strip fallowing.

Mr. Wuerthner: I believe that is all.

Cross Examination

Q. (By Mr. Cyr): I believe you said on direct examination that this erosion was the result of the farming operation of Mr. Henneman, is that right?

A. Well, yes, it was one of them that leased it that way.

Q. When did you first observe this erosion on this land [167] to the extent as it could not be irrigated?

A. From away back in years of 30, in the 30's.

(Testimony of Frank Kuka.)

Q. It commenced away back? A. Yes.

Q. And after it commenced you have been able to deliver water to this land?

A. Yes, I have had to clear and maintain the ditches.

Q. And it was in the year 51 that you determined that the erosion had continued to such an extent it could not be irrigated, is that right?

A. On that particular piece.

Q. You are referring to the south half of the southeast quarter? A. Yes.

Q. Prior to that time it was subject to irrigation? A. That is right.

Q. Did you make that survey at the request of Mr. Henneman? A. We did.

Q. Now you testified that you delivered water to Mr. Aiken in 41 and 42, would you indicate on Plaintiff's Exhibit 2 where that water was used?

A. Here.

Q. You are referring to the north half of the north half of section 25? [168]

Q. And you delivered water to that in 41 and 42? A. Yes.

Q. And that was at the request of Mr. Aiken?

A. Yes.

Q. Was that used for irrigation purposes?

A. It was.

Mr. Cyr: That is all.

Mr. Wuerthner: That is all.

Mr. Wuerthner: Call Mr. Clarence Parlemee.

CLARENCE PARLEEMEE

was called by defendant and testified as follows:

Direct Examination

Q. (By Mr. Wuerthner): Your name is Clarence Parlemee? A. Yes, sir.

Q. Where do you reside?

A. 10 miles northwest of Valier, Montana.

Q. Are you acquainted with the land involved in this action which was formerly leased by Mr. Aiken, the defendant? A. Yes, sir.

Q. How long have you resided in that vicinity?

A. About 29 years.

Q. And what has been your occupation?

A. Rancher. [169]

Q. And you have ranched all of that time?

A. Yes.

Q. And you are familiar with the ranching operations in that area? A. Yes, sir.

Q. Are you familiar with the system of irrigation canals or ditches that are involved in this action? A. Yes.

Q. And you know the approximate condition of these ditches during the time that Mr. Aiken had his leases? A. Yes, sir.

Q. Are you acquainted with the type of farming that is practiced in this area during the time Mr. Aiken had the lease? A. Yes, sir.

Q. Isn't it a fact that you had also leased land in the general vicinity of these leases in question?

A. I did.

Q. And with reference to the land formerly

(Testimony of Clarence Parlemee.)

leased by Mr. Aiken where is *your and* in a general direction?

A. Approximately half a mile south.

Q. Half a mile south?

A. Approximately, yes.

Q. And you are ranching under an Indian lease?

A. Well, both. [170]

Q. Let me ask you is your area covered by this irrigation project? A. Yes.

Q. And the land that you farm is it similar to the land involved in this action?

A. Very much so.

Q. Now you heard Mr. Kuka testify regarding some erosion that has gone on, do you know anything about that? A. Yes, I do.

Q. Do you know approximately how long this land has been eroding? Mr. Kuka stated it had been eroding since some time in the 30's?

A. It was broken up from the sod in about 23, along in there.

Q. '23?

A. Yes, and of course it didn't erode until the sod was worked out of it, '23 or I imagine that is correct; it really got down to business in the 30's to protecting.

Q. Do you know what method of farming Mr. Aiken pursued in farming the leased land in question, whether it was strip or block?

A. Strip.

Q. And did he strip farm during the entire term of his lease, if you know?

(Testimony of Clarence Parlemee.)

A. I believe so, every year from the start I couldn't [171] swear but to the best of my knowledge he stripped all the way through.

Q. Is that land being stripped at the present time? A. Yes, it is.

Q. Do you recall any time that land was block farmed? A. Yes.

Q. And do you know approximately when that was?

A. I believe about up until the time that it was broken until Mr. Aiken took it over, I believe.

Q. Are you aware of the fact Mr. Aiken was on this land in 39 or 40? A. Yes.

Q. And you say it was block farmed up until about that time?

A. About that time, I think.

Q. Do you do any irrigating on this land?

A. Not any more.

Q. Does anyone in the surrounding vicinity to this land or to Mr. Aiken's former land do any farming by irrigation? A. Very little.

Q. Do you farm by the strip method also?

A. Yes.

Q. Is it possible to irrigate land when you farm by the strip method?

A. It is possible but very impracticable. [172]

Q. Have you ever had an occasion to bid for some of this Indian land? A. Yes.

Q. Are you acquainted with the Government regulation that requires strip farming when you farm in a dryland area?

(Testimony of Clarence Parlemee.)

A. No, due to the fact that I haven't leased recently.

Q. What have you to say with regard to erosion when farming by the strip method?

A. It practically stops it; it does practically stop.

Q. And what about farming the block method in relation to erosion?

A. Impossible, the soil all blows away.

Q. Now do you know what type of soil was involved in the leases to Mr. Aiken?

A. Yes.

Q. What type soil was that?

Mr. Cyr: To which we will object on the grounds the witness has not been qualified as an expert in this case.

The Court: He has been farming there for 29 years, that ought to be some qualification.

Mr. Cyr: Within the area, I don't know that he has been on this land.

The Court: How long have you been ranching and farming including this land in question here?

A. 29 years.

The Court: About 29 years, that ought to have some probative value. [173]

Q. (By Mr. Cyr): Have you been on Mr. Aiken's land?

A. Many times.

Q. And is the land there the same as the land as you farm?

A. Yes.

Q. And the land which you farmed for 29 years if this land half a mile south of the lands here in question?

(Testimony of Clarence Parlemee.)

A. Yes. I didn't say that I had farmed that particular piece of land 29 years; I said I had resided there 29 years.

Q. You have resided there but you haven't farmed it for 29 years?

A. I farmed this particular piece of land for 19 years.

Q. That is the last 19 years? A. Yes.

Mr. Cyr: We will withdraw the objection.

Mr. Wuerthner: Would you read the last question?

(Question read: What type soil was that?)

Mr. Wuerthner: I am referring now to the soil involved in Mr. Aiken's leases?

A. The same as mine. It is a little lighter soil; it won't clod or, you know, get rough but on the ground disintegrate and blow.

Q. Now with reference to this type of soil what have you to say as to the irrigability? [174]

A. I had to quit irrigating mine; I couldn't handle the water.

Q. What do you mean by that?

A. It would just turn it out of your ditches and after it went just a little ways it will gather and gather and just wash gullys and wash your grain out down these ditches that are formed on its own gathering.

Q. In other words, the ditches become gullys if water is applied to the ditches, is that your testimony?

A. I didn't say that but that is right and it

(Testimony of Clarence Parlemee.)

washes the ditches so deep you can't get the water out of them.

Q. Have you ever seen water in any of the ditches involved in this case? A. Yes.

Q. Referring to Plaintiff's Exhibit 1 I will ask you if you have observed water in the ditch known as lateral K specifically between red 3 and red 4?

A. Yes.

Q. You have observed water in that ditch how often or when did you last observe water, I will put it that way?

A. Before Robert Aiken's time.

Q. And did you observe water in that ditch during the time Mr. Aiken leased that land?

A. No.

Q. You never saw water in it at that time? [175]

A. No.

Q. Do you recall that special incident that time that you saw water in that ditch any action of the water upon the ditch?

A. Oh, yes, it washed a big gully out clear down through here; I go down that way all the time.

Q. In other words, where would the gully extend, would it extend over into the green portion of the map?

A. Yes, it would; its filled in considerable now, but it did wash a big gully down through here.

Q. And in your opinion was it possible to irrigate where the water washed these gullies that you testified to?

(Testimony of Clarence Parlemee.)

A. I say no because I had to quit mine on this similar circumstances.

Q. What is the result of water washing these gullys with regard to the top soil you testified to?

A. Well it just washes it away and it washes it down in this next ditch below you would like to use and the silt settles in that and the ditches block up and they all run over.

Q. In other words, the water from one ditch will wash the soil over the land to the ditch below and cause it to flow over? A. Flow over.

Q. Would that make the ditch below incapable of any use? A. That is right. [176]

Q. Do you recall ever finding any water washing into what is known as rock gully, now that is the gully running generally through the lands leased by Mr. Aiken?

A. That is on this big ridge to the north here; I don't have occasion to go; I have occasion to go down this way to my own land.

Q. You are referring to a portion of the land east? A. North.

Q. You have never seen any water washing into rock gully because there is a ridge there?

A. Yes.

Q. Where does most of the washing occur?

A. This way on this side.

Q. You are pointing in a southeasterly direction? A. That is right.

Q. Are you acquainted with a portion of the

(Testimony of Clarence Parlemee.)

land in the Indian Reservation which is designated as a dry land area or is there any such designation known to you? A. No, there isn't.

Q. Your farming operations consist of all dry land farming, is that correct?

A. That is right.

Q. In the dry land farming method how do you strip farm or block farm?

A. Strip entirely. [177]

Q. And that is in the area involved also in this case, is it not? A. That is right.

Q. There is no block farming I believe you testified? A. No.

Mr. Wuerthner: That is all.

Cross Examination

Q. (By Mr. Cyr): Mr. *Cyr*, where is your land located with reference to section 30 and section 29, I will hand you Plaintiff's Exhibit 1, would you indicate on there what section this land was in? You are in section 36. Now you see the red mark which appears going through section — is your land through this black area?

A. I have it on both sides of the creek.

Q. Just south of section 30? A. Yes.

Q. Are you in the Blackfeet Irrigation Project?

A. Yes.

Q. All of it or part of it?

A. Part of it, part of the acres, the creek, Birch creek is the reservation line; I have land on both sides of it.

(Testimony of Clarence Parlemee.)

Q. And Birch Creek is the black area on [178] Plaintiff's Exhibit 1 which appears in the section which is south of section 30, is that right?

A. I didn't follow you.

Q. This black area that is where your land is, is it?

A. That is commencing a gully; yes, I run over here; that is just gullys and creeks.

Q. So the area which you have next to section 30 is all gullys or creek beds or something of that kind?

A. No, no, not all of it.

Q. Has any of that *be* determined, any of your land within the Blackfeet Irrigation Project determined to be irrigable?

A. No.

Q. None of it has been determined to be irrigable?

A. No.

Q. And you have never been assessed any O & M charges as a result of that on that land?

A. No, not that I know of.

Q. Have you leased some other lands in the Blackfeet Irrigation Project?

A. Yes.

Q. Do you have to pay O & M charges?

A. At one time.

Q. On those which were designated as irrigable of that leased land? [179]

A. That is right.

Q. And everybody in the project has to do the same thing, do they not?

A. I can't answer that.

Q. How long has it been since you leased in there Mr. Parlemee?

A. Oh, about 8 or 10 years.

(Testimony of Clarence Parlemee.)

Q. And at the time you had leased in there were you using water for irrigation?

A. No, we didn't use it.

Q. On the leased land? A. No.

Q. But you had to pay your O & M charges anyway? A. Yes.

Mr. Cyr: That is all.

Redirect Examination

Q. (By Mr. Wuerthner): The O & M charges that you paid were provided for in your lease, were they not? A. Yes, sir.

Q. How long ago would you say that was?

A. About 8 years ago, I believe, or 10. I just can't remember. [180]

Q. Now was the land you paid O & M charges on located close to the land in question here or where was it located with reference to Mr. Aiken's former land?

A. About half a mile south and a little bit west.

Mr. Wuerthner: That is all.

Mr. Cyr: No further questions.

LLOYD CAMPBELL

was called by the defense and having been duly sworn testified as follows:

Direct Examination

Q. (By Mr. Wuerthner): Will you please state your name? A. Lloyd Campbell.

Q. Where do you reside?

(Testimony of Lloyd Campbell.)

A. I get my mail at Williams, Montana, that is 6 miles east of Valier where I live.

Q. You live approximately 6 miles east of Valier? A. Yes.

Q. And you are here in response to a subpoena?

A. That is right.

Q. How long have you lived 6 miles east of Valier? A. I came to Montana in '15.

Q. And resided up there?

A. Been there ever since. [181]

Q. Are you acquainted with the defendant?

A. Yes, I am.

Q. How long have you known him?

A. Well all his life I guess about.

Q. You have known the defendant then as long as you have been up in that vicinity then?

A. Yes.

Q. What is your occupation?

A. I am a farmer.

Q. How long have you farmed?

A. Since '15 here in Montana.

Q. Up to date?

A. Up to date and still farming.

Q. Where is your farm located?

A. 6 miles east of Valier.

Q. East of Valier? A. Yes.

Q. Where is it located with reference to the land previously leased by Mr. Aiken involved in this action?

A. I guess it is about 15 miles south and east.

(Testimony of Lloyd Campbell.)

Q. Is your land a part of the irrigation project?

A. My land is part of the Valier Irrigation Project; that is a different irrigation project than the land that Aiken was involved in.

Q. Is your land, does it border on the [182] Blackfeet Irrigation Project?

A. The Blackfeet Irrigation Project is north and west of Valier, just across Birch Creek, while I live east of Valier so I am 14 to 15 miles from the Blackfeet Indian Project, Reservation.

Q. Are you acquainted with the character of the land involved in this action? A. Yes.

Q. Have you been over this land?

A. I have but several years ago.

Q. How long has it been since you have looked at this land?

A. Well, I don't know exactly but probably 12, 14 years.

Q. You have looked over this land during the time Mr. Aiken had his leases, did you not?

A. I have been in that vicinity several times.

Q. Did you actually physically go over this land, land of his?

A. I don't remember I was over that same place but I have been near it several times.

Q. Do you know or are you acquainted with the system of irrigation canals which exists in or on the land leased by Mr. Aiken?

A. I am not too well acquainted with the ditches right in that area or what shape they may be in.

(Testimony of Lloyd Campbell.)

Q. Did you know at the time you went over here over this land what condition these ditches were in?

A. Well that was quite a few years ago but I don't remember of any certain ditch; I couldn't tell you much about the ditches.

Q. What have you to say with reference to the leased land involved in this action as compared with the land which you are farming?

Mr. Cyr: To which we object.

Mr. Wuerthner: Just a minute, let me finish my question.

Q. Would you say, if you know, whether your land is similar or not to the land leased by Mr. Aiken.

Mr. Cyr: To which we object, there is no proper foundation laid. This man testified his land is 15 miles away and on a different project and he hasn't been there in recent years and he didn't go on the land and hasn't been in the vicinity of it.

The Court: Sustain the objection unless you establish a foundation.

Mr. Wuerthner: I will further qualify him.

Q. Did you occupy any official position at Valier?

A. No, not in Valier. I don't know what you mean.

Q. Did you have any connection with the allotment program?

A. That is a County program and I am chair-

(Testimony of Lloyd Campbell.)

man of our [184] Pondera County allotment or A.S.C. as we call it.

Q. Do you know whether or not the lands leased by Mr. Aiken are in Pondera County?

A. Yes, they are in Pondera County.

Q. How long have you had this position?

A. Well, I have been one of the committeemen for about 14 years, I think I have just been chairman for two years.

Q. But you have been on the committee for 14 years? A. Yes.

Q. Now as a part of your duties in connection with this job were you required to go out and look over various parcels of land?

A. As a committeeman unless there was something special we weren't required to go check each piece of land although the county committee hires help to check wheat acres and other practices, conservation practices I should say.

Q. Did you ever check wheat acres on this land leased by Mr. Aiken? A. Not personally.

Q. You never were personally on his land?

A. I never check wheat acres personally on this piece of land but we have hired men to do that job.

Q. Did you state that you were personally on this land approximately 12 years ago?

A. I have been on that land at different times, and one [185] reason I use to have a sister who lived right near it and we visited there a lot of times and we would drive around through their different crops.

(Testimony of Lloyd Campbell.)

Q. Did you ever look at Mr. Aiken's crops?

A. No, I don't remember ever being there when Mr. Aiken was farming it.

Q. Do you know what type farming Mr. Aiken followed?

A. Most of his farming is strip farming.

Q. Is that based on your observation of his land?

A. What I see of the record in our allotment program his farm, this farm in particular in our records shows that it is stripped.

Q. What records are you referring to?

A. The county A.S.C. Agricultural Stabilization Conservation.

Q. And did you examine those records prior to coming down to testify in this action?

A. I have.

Q. And your testimony now is based upon your examination of those official records?

A. Yes, in our farm program.

Mr. Cyr: We will object to the witness volunteering anything, your Honor.

Mr. Wuertner: I think this is in answer to the question I asked. [186]

Mr. Cyr: I think this question was answered. It appears to me the witness is not qualified to testify. Now if he is going to testify from records, we object on the grounds it is not the best evidence, the records themselves would be the best evidence. He has never been on the land and does not know anything about it; the witness is per-

(Testimony of Lloyd Campbell.)

fectly honest and does not know anything about these lands.

Mr. Wuerthner: Well I better put a question to him and we will see.

Q. Now, Mr. Campbell, did you testify that you have been chairman of the allotment committee for the last two years?

A. This is the second year.

Q. And in your capacity as chairman of the allotment committee did you have official access to the records of the committee? A. That is right.

Q. And are the records kept under your direction and supervision? A. That is right.

Q. And you testified that you had occasion to examine the official records of the committee?

A. Yes.

Q. And where are those records kept and maintained?

A. They are kept in the courthouse. [187]

Q. What county?

A. Pondera County at the A.S.C. office.

Q. Now I am handing you defendant's proposed Exhibits 12 and 13 and ask you if you can identify those? A. Yes, I have looked at these.

Q. Will you identify them?

A. That is what we have in our record.

Q. Now are you referring to both exhibits 12 and 13, are you not?

A. This one is 12 and that is the one that has the land that is in question.

Q. In other words, all of the land shown on

(Testimony of Lloyd Campbell.)

Exhibit 12 is involved in this action? A. Yes.

Q. What about Exhibit 13?

A. Here just a part of this.

Q. A portion of 13 is involved in this action also? A. That is right.

Q. Who made up that exhibit?

A. This was made in our A.S.C. office off from an aerial map or aerial photo I should say that was taken in 51.

Q. Is that aerial photo which you testified to an official record in that office? A. It is.

Q. And that photo is on file in that office? [188]

A. It is.

Q. And what file number does it bear?

A. The photo number is 7 H 186.

Q. And both exhibits were prepared from that aerial photo, were they not?

A. And this exhibit 13 aerial photo No. is 7 H 170.

Q. I note that Exhibit 12 contains two pages, is the second page a copy of the first page on that exhibit?

A. These were both made from the aerial photos.

Q. From the same aerial photo?

A. In the field last summer in check wheat acres they got this one mixed up so there was a new map, otherwise they are the same, the top page is a new map prepared from the other copy.

Q. The top page is a new map prepared from the other copy? A. That is right.

Q. Now who prepared these exhibits?

(Testimony of Lloyd Campbell.)

A. The girls that work in the office.

Q. Were they prepared under your direction and supervision? A. That is right.

Q. And they were prepared at your instance?

A. That is right.

Q. And are they or do they truly portray as a copy the [189] official records in the office of the acreage program? A. That is right.

Q. And that is a correct portrayal then of the original records? A. Yes, it is.

Mr. Wuerthner: We offer into evidence defendant's proposed Exhibits 12 and 13.

Q. (By Mr. Cyr): When were these records made, Mr. Campbell?

A. They have been made, that new one was made since last summer.

Q. Which do you mean, new one, 13 or 12?

Mr. Wuerthner: Show them to him so he can clearly identify them.

A. This top one here was made since the fieldman was out last summer and mixed this one up.

Q. You are referring to Exhibit 12?

A. Yes, I don't know the time these were made but they have been made within the last year and a half.

Q. Each of these have been made within the last year and a half?

A. They were working on the maps and if there is any change in a farm they make a new map for it.

(Testimony of Lloyd Campbell.)

Q. These don't reflect what was done from 44 to 49 on the lands here described? [190]

A. This was made from the aerial photo in 51 as the fields were at that time.

Q. As the fields were in 51? A. Yes.

Q. Do you know who the, it says here the operator was Henneman at that time?

A. It is now.

Q. And he still is?

A. He is the operator now on our records.

Mr. Cyr: We object, your Honor.

Mr. Wuerthner: May I ask two or three questions in regard to this before you make your objection?

Q. Referring again to Defendant's proposed Exhibits 12 and 13, tell us if you know of your own knowledge whether or not the conditions portrayed herein are the same as existed from 44 to 49?

Mr. Cyr: To which we object, your Honor, on the grounds there has been no proper foundation for the question the witness testified he is not familiar with the lands in question.

The Court: I will sustain the objection.

Q. (By Mr. Wuerthner): You state you were last on the land involved in these exhibits 12 years ago approximately? A. Yes. [191]

Q. That would be approximately 42?

A. Yes, along in that time.

Q. And you have not been personally on these lands since that time?

A. No, I can't recall that I have.

(Testimony of Lloyd Campbell.)

Q. Do you know whether or not there have been any changes in the lands from the last time that you were on the land and as shown by these exhibits?

Mr. Cyr: To which we will object on the grounds the witness testified he had no independent recollection of ever being on this land, that he was in the area.

The Court: Sustain the objection.

Mr. Wuerthner: Your Honor, we are now offering these documents under the official document rule and we believe we have laid the foundation now for admission into evidence under that rule.

Mr. Cyr: Our objection is not to the identification of them or to the fact this man would be personally introducing them into evidence, if they are relevant, but they have no materiality to the matters in issue in this case; they were made for the records and the originals of which were long after and the witness testified the condition of the soil changed during that time; our objection is as to the materiality of the exhibits.

The Court: I can't see how they will be material now [192] in view of the testimony given by this witness.

Mr. Wuerthner: Your Honor, I believe we can tie the materiality in by another witness on these exhibits.

The Court: Very well then you may attempt it if you can.

Mr. Wuerthner: Mr. Henneman.

HENRY L. HENNEMAN

resumed the stand and testified as follows:

Redirect Examination—(Continued)

Q. (By Mr. Wuerthner): I am handing you defendant's proposed Exhibits 12 and 13 and ask you if you can identify them? A. Yes, I can.

Q. Did you ever receive copies of these exhibits?

A. I have copies exactly like that.

Q. And when did you receive these copies?

A. Early last spring, a copy of both of them.

Q. A copy of both of the exhibits?

A. Yes.

Q. Now do you know what those exhibits purport to represent?

A. They show who has been on the farm and the acres for each strip, that is so each farmer can figure the allotment wheat acres he is to seed.

Q. Now, Mr. Campbell has testified these exhibits were [193] prepared or based on an aerial photo taken in 51, now I will ask you whether or not that represents the condition of the land at the time you took this lease in 51 and also the time you took your lease in 49 on a portion of the lands occupied by Mr. Aiken prior to you?

Mr. Cyr: To which we object on the ground no foundation laid; it hasn't been shown this witness ever saw the aerial photograph from which these records were prepared.

Mr. Wuerthner: Your Honor, we already have testimony in this is an accurate portrayal from the aerial photograph.

(Testimony of Henry L. Henneman.)

The Court: Yes, and also at the direction of the committee. Let him answer the question.

A. I didn't quite understand your question.

Mr. Wuerthner: Read the question.

(Question read.)

A. Yes, it does.

Q. In other words, at the time you took possession of the lands involved in these two exhibits there was no change from the exhibit as shown here, is that correct? A. That is correct.

Mr. Wuerthner: Now may it please the court, I would like to further identify these by calling Mr. Aiken for the limited purpose only of further identifying this exhibit. [194]

The Court: Very well.

ROBERT AIKEN

defendant, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wuerthner): Will you please state your name? A. Robert Aiken.

Q. You are the defendant in this action?

A. Yes, sir.

Q. And you have previously leased the land involved in this action? A. Yes, sir.

Q. Handing you defendant's proposed Exhibits 12 and 13 I will ask you if you can identify those?

A. I identify 12.

Q. Will you identify 12? A. Yes.

Q. What is it?

(Testimony of Robert Aiken.)

A. It is a portion of the land I had leased on the reservation.

Q. It is a portion of the land? A. Yes.

Q. Do you know about what portion that represents? A. There are six 40's missing. [195]

Q. In other words, that portion of the land you rented previously except 240 acres? A. Yes.

Q. Now with reference to Exhibit 12 will you examine it and tell the court whether or not that portrays the land the same as when you occupied it? A. Yes, sir, it does.

Q. Has there been any change in the land since you occupied it as shown by that exhibit?

A. No, sir.

Q. It is exactly the same? A. Yes, sir.

Mr. Wuerthner: Do you have any examination?

Mr. Cyr: Yes.

Cross Examination

Q. (By Mr. Cyr): Have you ever seen Plaintiff's Exhibits 12 and 13 before? A. No, sir.

Q. You have never seen it before? A. No.

Q. How do you know what they are, Mr. Aiken?

A. Because I recognize the lay of the land and the [196] maps made out that they sent me at the time I farmed it.

Q. At the time you farmed it, Mr. Aiken, did you have those?

A. That isn't my—I said 12.

Q. 12? A. I have that.

Q. Do you have that yet?

(Testimony of Robert Aiken.)

A. No, I do not have it now.

Q. And when you say that the land is the same what do you mean by that answer?

A. It is stripped out.

Q. You mean you strip farmed it also?

A. Yes, sir.

Q. And it is being strip farmed now?

A. Yes.

Q. You can't tell anything else from the exhibit? A. No, sir.

Q. You think then the fact it is stripped farmed? A. It is stripped.

Q. Referring again to Exhibit 12 does this represent then the manner of farming during the entire time that you occupied the land there shown?

A. What is that now?

Q. Does this show the method of strip farming as you say during the entire time you occupied that land? [197] A. Yes, sir.

Mr. Wuerthner: We now offer into evidence defendant's proposed Exhibits 12 and 13 first under the official business records rule and with regard to Exhibit 12 for the purpose of showing the method of farming.

Mr. Cyr: To which we object on the ground it is not material and the objection is formal because it does not make any difference whether he strip farmed or anything else, it hasn't anything to do with the materiality of this case, even admitting the fact he stripped farmed it he would owe the O & M charges.

Mr. Wuerthner: May I answer that briefly there is in evidence here farming and grazing leases.

The Court: To save time I will admit it subject to objection and you can explain it later on and then I will see what I will do with it.

Mr. Wuerthner: Will you please take the stand again, Mr. Campbell?

LLOYD CAMPBELL

resumed the stand:

Direct Examination—(Continued)

Q. (By Mr. Wuerthner): Now, Mr. Campbell, referring you again to Defendant's Exhibits 12 and 13, I will ask you now what they show?

A. Well they show the operator's name as it is now, [198] and the owner, Indian Agency description of the land, and it shows the method of farming on this land over in this one corner.

Q. You are referring to the upper lefthand corner of Exhibit 12?

A. Is a little area marked with an X that means that corner is soded, evidently a gully or something in there that can't be plowed out.

Q. Now there are also appearing at the top of this graph some figures, will you explain what they represent?

A. That is the acres in each one of the strips, for instances, the first one on the left side is 11.7, the next 12.3. Now had there been a ditch through here or a gully it would have showed a mark through as it does on this one up here.

(Testimony of Lloyd Campbell.)

Q. You are referring to Exhibit 13?

A. Yes.

Q. And there is a small square at the top of the exhibit and you see that at the top of the square a ditch is shown?

A. It shows a ditch or gully again and then shows on this one where there have been new strips established as of the last year.

Q. Now what is the purpose of those amounts or acreages?

A. Those are for the benefit of the farmer, the operator, and also for our use in the allotment program; if you notice [199] this first strip it says durum.

Q. Exhibit 12?

A. That means in 55 it was durum wheat fields, the next summer fallow and the next one durum and so on until we get to strip No. 15 where it is spring wheat.

Q. Mr. Campbell, I believe you previously testified you have farmed in the general vicinity of this land for the last 40 years? A. Yes.

Q. Are you acquainted with the method of farming in that vicinity? A. Yes.

Q. Would you tell the court the method you employed, whether or not it is strip or block farming?

A. There are changes going on all the time and in the period spoken about a little while ago here, 30's when we had a lot of soil erosion from the field block summer fallow the method was changed

(Testimony of Lloyd Campbell.)

from block farming over into strip farming and that applied on irrigated land or dry land, either one.

Q. Is that land in that general vicinity dry land or irrigable land?

Mr. Cyr: To which we will object on the grounds this witness is not qualified to answer the question, he has never been on the land and he testified he hasn't seen [200] the crops growing on the land when Aiken was there and he doesn't know whether it was irrigated or not.

The Court: I think you will have to add some additional qualification to permit that answer to be made.

Q. Mr. Campbell, have you ever had occasion to irrigate any of this land?

A. In the 40 years I have farmed I expect there's never been a year but what I have irrigated some.

Q. That you haven't irrigated some?

A. Some land.

Q. What type of land did you irrigate?

A. Well my irrigated land is more on the level and it is not as much rolling land, and the last few years, well, we will say the last 10 or 12 years I have irrigated very little grain, it is mostly alfalfa, hay and pasture.

Q. Do you strip farm in the area that you irrigate?

A. Ours is strip farming, is all narrow strips as these in the picture and I irrigate very little grain.

The Court: I don't see the materiality of this witness putting in a lot of time here that I am afraid won't have much attention later on.

Mr. Wuerthner: That is all we have.

Mr. Cyr: No questions. [201]

ROBERT AIKEN

resumed the stand and testified as follows:

Direct Examination

Q. (By Mr. Wuerthner): Your name is Robert Aiken? A. Yes, sir.

Q. And you have previously testified in this case? A. Yes, sir.

Q. And you are married? A. Yes, sir.

Q. You have a family? A. Yes.

Q. What does it consist of?

A. A girl and a boy.

Q. Where do you reside? A. Valier.

Q. How long have you lived there?

A. I lived right in Valier about 10 years. I lived out of Valier all the rest of my life, about six miles.

Q. How long have you resided in Pondera County? A. All my life.

Q. What is your occupation?

A. Farming and ranching.

Q. How long have you been engaged in farming? A. Ever since I was about 18. [202]

Q. Can you give us approximately how many years that would be?

A. I was raised on a farm and I farmed for myself the last 23 years.

(Testimony of Robert Aiken.)

Q. Calling your attention to Plaintiff's Exhibit 1 I will ask you if you know what that portrays?

A. Yes, it is the land that I had leased and the ditches.

Q. Now does the same portions accurately represent the land which you leased from the Government?

A. Yes, sir.

Q. And do the ditches as shown there accurately portray the conditions as they existed during the time you held your leases?

A. Well, no, No. 3 here was not there until about '48.

Q. You refer to the ditch terminating at?

A. 3.

Q. Now will you restate that on the basis of the exhibit?

A. No. 3, there was no ditch in there when I first had the land until about '48.

Q. You are referring to blue 3? A. Blue 3.

Q. And the ditch running off the main ditch there, was it there?

A. This ditch here there was just a mark down through.

Q. Red 3 to red 4? [203]

A. At that time we drove across there about in here.

Q. Did you lease this land prior to '44?

A. Yes, sir.

Q. And which land did you lease?

A. Well I had all of this in here except——

Q. Now you are pointing there to the——

(Testimony of Robert Aiken.)

A. North half of 30 and north half of southeast quarter of 30 and the northeast quarter of the southwest quarter of 30.

Q. In other words, did you lease the land previously shown in green? A. Yes.

Q. All of it?

A. Not all of it, these two 40's.

Q. You are referring to——

A. Lot 1 in section 25 and northeast quarter of the northwest quarter of section 25.

Q. And did you lease the land shown in section 26? A. Yes, no, not at that time.

Q. When did you first come on that land?

A. In about '39.

Q. Did you go on the land pursuant to a lease?

A. No, Mr. Cross, the lease clerk at Browning, at that time I was looking for some land and he come down and told me that he would take me up and show me this land and there was a lot of it had blown and big sand piles on it and he said [204] if I would take the strip there, he would give me a lease on it and he said if I wanted water, I could pay for it in advance and get it.

Q. Who was Mr. Cross?

A. He was the lease clerk in Browning.

Q. Is he the lease clerk up there at the present time? A. No, he is not.

Q. Now the period 39 to 44 did you use any water on the lands that you have testified to?

A. 39 to 44 there was two 40's I had water on.

Q. Where were those 40's on?

(Testimony of Robert Aiken.)

A. Lot 1 in section 25 and the northwest quarter of the northwest quarter of section 25, I broke it out.

Q. What do you mean?

A. It was in sod and I broke it out and watered them the first two years.

Q. Will you tell the court why you irrigated those first two 40's?

A. I cropped it to flax the first year and the second year I put in wheat and tried to irrigate it again to bring it through and the sod won't produce very much, it don't hold the moisture and after that I stripped it out.

Q. Is sod more susceptible to irrigation than other types of land?

A. Yes, it is clotty and will hold the water.

Q. It will hold the water better?

A. It will not wash.

Q. Now, Mr. Aiken, how do you classify the land involved in this action which you formerly leased?

A. I would classify it as dryland.

Q. And why do you classify it that way?

A. Because it is too rolling to irrigate and too light to do anything but strip it out and it will not blow away.

Q. When you entered into the 44 lease, was it pursuant to a notice?

A. They sent out a notice of the bid for farming and grazing leases.

(Testimony of Robert Aiken.)

Q. And you read the notice and then submitted your bid? A. Yes, sir.

Q. Did the notice anywhere specify whether or not the land was irrigable or not?

A. No, sir, it did not.

Q. No mention was made? A. No.

Q. And how had you farmed the land for the previous five years before you entered into the 44 lease? A. Farmed it as dryland.

Q. How has that land been farmed since your lease, if you know?

A. It is still stripped out and farmed as dry.

Q. Now, Mr. Aiken, do you know when the first demand for water rental was made upon you?

A. Around '50.

Q. Was that after the termination of the '44 lease? A. Yes, it was.

Q. Do you know whether or not this land involved could be farmed by irrigation?

A. It could be but it is not practicable.

Q. Impracticable? A. Yes.

Q. Could the land involved be irrigated by means of ditches in the area?

A. No, it could not.

Q. Why not?

A. Because they aren't large enough, there is only about ten days out of a year that you can irrigate grain and give any advantage to it and there isn't ditch enough to handle enough water to irrigate that much.

Q. Is the land susceptible of irrigation?

(Testimony of Robert Aiken.)

A. No.

Q. Why not?

A. It is kind of flaky soil and washes very bad.

Q. The soil washes? A. Yes.

Q. Would you say from the irrigation system of ditches [207] as shown on the map that water could be brought to the land?

A. It could be brought there but not sufficient quantities enough to irrigate with.

Q. Now with regard to the designation of the irrigation project where the lands leased by you correctly designated as the Blackfeet Indian Irrigation Project? A. Yes.

Q. What have you to say with regard to the Badger-Fisher Irrigation Project?

A. That is a project that is a portion of the Blackfeet Indian Reservation.

Q. Was that portion of which you leased?

A. I am on the east end of it on the Badger-Fisher Irrigation Project.

Q. Now at the time you entered into the '44 lease who did you negotiate that lease with?

A. I made a bid out, you mean previous to '44?

Q. No, on the '44 lease?

A. On the '44 lease I made out a bid and sent it in to the Superintendent of the Blackfeet Indian Reservation and marked lease bid on it.

Q. Can you state whether or not at that time any mention was made of the irrigable land?

A. There was not.

(Testimony of Robert Aiken.)

Q. What was your understanding at that time as to the [208] type of land?

A. I figured it was dryland.

Q. And what was that based upon?

A. They sent me the lease and told me to get my two bondsmen and sign up with the first year's rental sent back to them and they would approve the lease and they made no demand for any water.

Q. How did you previously farm?

A. I farmed the dry stripped out.

Q. At the time you executed the '44 lease was any demand made upon you for water rentals?

A. No.

Q. And there had been no demand until as you testified in '50? A. Yes.

Q. Do you know how the land was allotted to you under the '44 lease?

A. To place a bid on it.

Q. I am referring to acreage? A. No.

Q. How many acres in a tract usually?

A. There's 320 on one allotment and 80 on another allotment and seven 40's on another allotment and they are all each separate allotments.

Q. What relationship is there between the allotment, [209] the allotted tract and the irrigability of the tract?

A. Well I always understood that whenever they issued 80, 100 or 320 it was considered as dryland and the irrigated acreage was allotted out in 40's.

Q. The irrigated acreages were allotted in 40's?

(Testimony of Robert Aiken.)

A. Yes.

Q. Mr. Aiken, I will ask you whether or not there are any rentals due under the two leases in question here? A. There is not.

Q. You have paid the rentals for the land in full? A. Yes, sir.

Q. Do you pay those rentals annually?

A. Yes, sir.

Q. At the time of the annual rentals payment was anything demanded in relation to water charges?

A. No, sir, there was not.

Q. Did you ever demand any water?

A. Not on this lease.

Q. Not under the two leases?

A. Not under the two leases.

Q. Did the Superintendent or the party in charge of the water offer to supply you water at any time during these leases?

A. Not during these leases.

Q. Do you recall during that period seeing any water in [210] the ditches?

A. Just at the end of the two major ditches is all.

Q. And how far would that be from your land?

A. Practically a mile on some, on one 40 the west side was right in it.

Q. I didn't get you.

A. They dumped the west side into the rocky coulee on one 40 of mine.

Q. Mr. Aiken, at any time during these leases

(Testimony of Robert Aiken.)

did you discuss the matter of farming with any of the officials of the Blackfeet Indian Project?

A. No, sir, I did not.

Q. And none of them ever called you, contacted you on it? A. No, sir.

Q. I am handing you Defendant's proposed Exhibit 6 and ask you if you can identify it?

A. Yes.

Q. Do you identify it?

A. Notice of sale of leases.

Q. Did you receive that? A. Yes, sir, I did.

Q. And did you put in any bid pursuant to that?

A. Not on this.

Q. Had your lease expired at the time you received that?

A. One of them had, the big lease had expired in '49. [211]

Mr. Wuerthner: We offer in evidence Defendant's Exhibit 6.

Mr. Wuerthner: I might ask you do you know who sent that lease out?

A. Sent out by the Browning Indian Agency.

Mr. Cyr: Your Honor, we will object to this on the grounds it is immaterial, and before I make the objection——

Q. (By Mr. Cyr): Did you lease the lands in '49? A. I had one lease running.

Q. You had received this same thing for '46?

A. Yes, I got one each year.

Q. Do you have the other you received in '46?

A. No, I haven't.

(Testimony of Robert Aiken.)

Q. And you didn't lease any land at all pursuant to Defendant's Exhibit No. 6? A. No.

Q. You just picked that up some time after these leases in question?

A. It was mailed to me. I just wanted to have that on hand.

Mr. Cyr: We object on the grounds it is not material to any issue in this case. We can, if counsel wishes, furnish the lease of '46 which was used.

Mr. Wuerthner: We are going to offer that in [212] evidence, your Honor, and I believe we can tie the materiality in.

The Court: It does not seem to be material now. It appears to be a notice of which he didn't take advantage; he never leased any lands under that lease; it wasn't pursuant to any lease that refers to.

Mr. Wuerthner: We would like the court's permission to tie this in with the lease specified in the complaint.

The Court: Well if you can—if you can show the materiality, that is a different thing. It is admitted subject to that. How many witnesses have you got there?

Mr. Wuerthner: This is my last witness.

The Court: Do you have some rebuttal?

Mr. Cyr: I don't think we have unless something appears from here on. We haven't anything presently in mind.

(Testimony of Robert Aiken.)

The Court: Well do you want to continue on and finish?

Mr. Cyr: Yes, your Honor, we would like to.

The Court: Very well, you may proceed under those circumstances.

Q. (By Mr. Wuerthner): Mr. Aiken, calling your attention to the latter portion of Defendant's Exhibit 6 I will ask you what appears thereon?

A. It shows allotment number and the allottee and description of the land and section, township and range, and also shows the irrigated acres, the dry acres and grazing [213] acres.

Q. And this notice was in '49, was it not?

A. Yes.

Q. Did the notice which you received and which solicited this '44 bid contain any breakdown of irrigated acres and dryland acres?

A. It did not.

Q. Do you know whether any notices you received subsequent to '44 contained that breakdown?

A. Not before '44.

Q. Did you receive any since that time or after that time that contained a breakdown of the irrigated and dryland acreages?

A. I received one practically every year but this is the only one I appear to have on hand at the time.

Q. And the '44 bid notice which you received contained no records to which acreages were farming and which were grazing?

A. They did not.

(Testimony of Robert Aiken.)

Q. What happened, appeared prior to that time, what about the breakdown between irrigated and dry acres?

A. The only thing it showed was farming acres and grazing acres in each allotment.

Q. Mr. Aiken, to clear up a discrepancy here, I believe you testified that no mention was made in the '44 sale of [214] farming and grazing leases? On the breakdown between farming and grazing I will call your attention to Exhibit 6 and ask you if there is a breakdown of the acres for farming and grazing?

A. There is for farming and grazing.

Q. But the farming acres were not broken down between irrigated and dryland? A. No.

Mr. Wuerthner: That is all we have.

Cross Examination

Q. (By Mr. Cyr): Mr. Aiken, did you have an opportunity to read the answer in this case before it was filed, do you recall? A. Yes, sir.

Q. Did you read that before it was filed?

A. Yes, sir.

Q. And in that you alleged no demand was made upon you prior to the time the action was filed in this case, do you recall that? And I am not trying to trick you. Mr. Aiken, do you recall that? A. I recall that.

Q. And now you say that actually a demand was made on you in '50, is that right?

(Testimony of Robert Aiken.)

A. They sent a slip that there was O & M charges due. [215]

Q. Did you represent to the court that no demand was made upon you prior to '50 for the payment of this money?

A. No, there was nothing prior to '50.

Q. There was nothing prior to that?

A. No, never received any.

Q. Now as a matter of fact prior to February 8, 1949, you conferred with your attorneys, Murch and Wuerthner, with reference to this matter, did you not? I will hand you what has been marked as Plaintiff's Exhibit 10 and refer you to the letter dated February 8, 1949, would you read that, please? Isn't that true?

A. That is a letter written by Murch and Wuerthner to the Superintendent.

Q. And what in reference to?

A. With reference to O & M charges on lease.

Q. And so you had talked to your attorneys prior to February 8, 1949?

A. I possibly had according to this but that account was dated '50 which has been offered in evidence.

Q. I am asking you now if it isn't true a demand was made on you in '48?

A. I don't think so.

Q. In the fall of '48?

A. Because when I got a letter from them up there they said that they would, if I didn't pay the O & M charges, they [216] would cancel the

(Testimony of Robert Aiken.)

lease and the big lease was already cancelled, it expired.

Q. From that letter does it refresh your memory when you first talked with your attorneys?

A. It would be around in there.

Q. You talked with them before they wrote that letter?

A. I talked to them the same time they wrote this or I wrote it.

Q. So you had notice at that time or some time prior to February 8, 1949, that you were to pay the O & M charges?

A. It could have been a few days there.

Q. So the answer is incorrect and your previous answer it was '50 are both wrong, are they not; it was on the 8th of February, 1949 or prior to that time?

A. It could be.

Mr. Wuerthner: At this time, your Honor, we move to amend our answer to conform to the proof; I am not sure whether federal rules permit that.

Mr. Cyr: I think as a matter of law if that is counsel's desire, the pleadings are amended to conform to the proof and under the circumstances we have no objection to it.

Q. When did you first go on to any of this land shown in Exhibit 1?

A. Well in '39 I got the first notice. [217] I was up there in the winter of 38 and spring of 39.

Q. And that was by virtue of the assignment of lease from Mr. Wickware, was it not?

A. No, sir.

(Testimony of Robert Aiken.)

Q. You did obtain an assignment of some property from Mr. Wickware, did you not?

A. I could have. I don't think it was from Mr. Wickware; it might have been Mr. Clarence Kuka.

Q. Or a portion of it? I will hand you what has been marked Plaintiff's Exhibit 14 and ask you if you recognize the signature on that?

A. Yes, sir.

Q. You do? A. Yes, sir.

Q. And what is that, sir?

A. It is a lease form, assignment of lease from Mr. Wickware.

Q. And when was that dated?

A. Its beginning in 40 the first two allotments, 41 and 42, and 40-41.

Q. What lease number was assigned?

A. Lease No. D 247?

Q. Now you accept the assignment and provisions of the lease and agreed to make payments thereunder, did you not? A. Yes, sir. [218]

Q. I will hand you what has been marked as Plaintiff's Exhibit 15 and refer you to the lease No. F G 247, that is the lease for which you accepted the assignment, was it not? A. Yes.

Q. And does that not cover some of the lands which are here involved?

A. Yes.

Q. Would you indicate on page 1 which lands are included within those exhibits?

Mr. Wuerthner: Your Honor, we are going to object to any testimony from these exhibits until

(Testimony of Robert Aiken.)

we have had a chance to examine the witness and see whether or not they are pertinent.

Mr. Cyr: We are just making the materiality foundation at this time identifying the exhibits.

Q. Did you identify the lands involved with relation to Exhibit 1?

A. The northeast northwest section 25.

Q. Is that part of the lands?

A. Northeast northwest.

Q. You are taking a portion of the land in section 25 on Plaintiff's Exhibit 1?

A. Yes, northeast southwest of section 30.

Q. Northeast of the southwest?

A. Of 30. [219]

Q. That is a portion of the lands which are covered in green on this Exhibit 1?

A. Yes, Lot 1 in section 25.

Q. And that is the portion marked in green on Plaintiff's Exhibit 1? A. Yes.

Q. So all of the lands which are described in that lease are a part of the lands covered in green on Plaintiff's Exhibit 1? A. Yes.

Q. Now you had occasion to see that lease prior to the time you accepted the assignment of it, did you not? A. I suppose I did.

Q. And you accepted the assignment of the lease after studying the provisions of that lease?

A. Yes.

Mr. Cyr: We offer in evidence Plaintiff's Exhibits 14 and 15.

(Testimony of Robert Aiken.)

Mr. Julius Wuerthner: Your Honor, I believe we could save a little time if we had a recess, there's some matters here that have just come to our attention that I think we have overlooked. I think it would be for the interests of justice if we could have a short recess.

Mr. Cyr: After they are finished, your Honor, and if they had any other witnesses, maybe they could call them. [220]

The Court: You have nearly finished?

Mr. Wuerthner: Yes.

Mr. Cyr: With this witness and cross examination I have just a few more questions.

Mr. Wuerthner: I would like to have permission to question the witness on Plaintiff's Exhibits 14 and 15 if I may.

The Court: You want to question him on those exhibits?

Mr. Wuerthner: Yes, your Honor.

The Court: Very well.

Q. Mr. Aiken, referring to Plaintiff's Exhibits 14 and 15, I will ask you at the time you executed the assignment of Exhibit 14 whether or not that was attached or stapled in any way to Plaintiff's Exhibit 15? A. I don't think it was.

Q. Were those two documents together at the time you executed the assignment?

A. Well I don't say but I don't believe they were.

Q. Did you receive copies of Plaintiff's Exhibit 15 which is the lease to Wickware?

(Testimony of Robert Aiken.)

A. I think they sent me a copy after this was signed over.

Q. But you don't recall whether these two documents were attached together?

A. I don't think that there was.

Mr. Wuerthner: No objection. [221]

Q. (By Mr. Cyr): Now, Mr. Aiken, you have testified these here Plaintiff's Exhibits 14 and 15 were a part of the lands that were in green on Plaintiff's Exhibit 1? A. Yes.

Q. Now those are the lands that are included in what has been described as the '44 lease, are they not? A. Yes, sir.

Q. So at the time you leased the '44 lease through that form on that land at least was irrigation, did you not?

A. I had never been asked to pay for water on it and I stripped it off.

Q. Would you just answer the question. You knew, however, that it was irrigable, did you not?

A. I didn't know it was irrigable any more than you could order water and pay for it if you wanted it and if you didn't use it, you didn't pay for it.

Q. You read where it says lessee agrees to pay operation and maintenance and construction charges as to irrigation in accordance with the rules and regulations of the Secretary of the Interior during the life of this lease?

A. Yes.

Q. That was a part of the lease?

A. Yes, at the time you could order water and

(Testimony of Robert Aiken.)

pay for it in advance and if you didn't want it, you didn't have to pay for it. [222]

Q. But in any event you knew that land was subject to the irrigation?

A. I knew it could be irrigated.

Q. You knew it could be irrigated?

A. If you wanted to.

Q. And you knew the Blackfeet Irrigation—that was a part of the Blackfeet Irrigation Project, you knew that too?

A. I knew it was the Badger-Fisher Project.

Q. Yes, part of the Blackfeet Irrigation District, I should say?

A. And one part on that when I ordered water the Watermaster, True, at the time accepted my money and said, that is off the project and if I got water enough, I will deliver it to you and if I haven't I will have to give your money back.

Q. But in any event at the time you got the lease you knew this was part of the Badger Creek Project in the Blackfeet Irrigation, did you not?

A. I know it was near there; I didn't know whether it was on the project or not.

Q. You did know it was on it?

A. I did not know it was on the project; I don't know where the boundary of the project was. Mr. True stated part of that was off the project.

Q. You knew where the ditches were? [223]

A. I knew where the ditches were.

Q. And the ditches were on your property?

A. Yes.

(Testimony of Robert Aiken.)

Mr. Cyr: That is all.

The Court: Any redirect?

Redirect Examination

Q. (By Mr. Wuerthner): Mr. Aiken, I believe you testified on cross examination you knew in '40 that this land could be irrigated?

A. There was parts of it you could order water for and irrigate it.

Q. What part are you referring to, the part you acquired through this Wickware lease?

A. Yes.

Q. Why didn't you order water?

A. Well I did on two 40's of it when I broke it up and after that I stripped it out because it was subject to erosion and blowing.

Q. Was there any erosion on the land you broke up?

A. No, it was sodded; I broke it up.

Q. And after it had been broken for a while does erosion occur?

A. Yes. [224]

Q. And is it common practice in that area when you break up land to irrigate it for the first year or so?

A. Yes, if it is handy and it lays in shape so you can irrigate it, it helps it out.

Q. Did you break up any land that is involved in the instant action under any leases which you held?

A. Yes, I did.

Q. I am referring to the lease in '44 and lease in '46 did you break up any land under those leases?

A. In the lease in '46.

(Testimony of Robert Aiken.)

Q. And did you irrigate the land after you had broken it? A. No, I did not.

Q. Was that farm land? A. Yes.

Q. You seeded that to crop?

A. I seeded it to crop.

Q. And you strip farmed it? A. Yes.

Q. And it is your opinion on the lands covered by 44 and 46 leases were drylands? A. Yes.

Mr. Wuerthner: That is all.

Mr. Cyr: No further questions.

The Court: Very well, that is all, Mr. Aiken.

The Court: That concludes the case.

Mr. Julius Wuerthner: We rest, your Honor.

The Court: Any rebuttal?

Mr. Cyr: We have no rebuttal, your Honor.

The Court: You both move for judgment in accordance with the prayer of your pleadings?

Mr. Cyr: Yes, your Honor.

The Court: How long do you need for briefs, do you think?

Mr. Wuerthner: Your Honor, prior to that and for the record may I renew our motion to dismiss which we made at the close of the plaintiff's case?

The Court: Yes. Overruled.

Mr. Cyr: Would 40 days on a side be too long?

The Court: Well it depends upon your engagements, if you are so tied up you feel you should have that, I will give you 40 days. I don't know there is any immediate rush.

Mr. Wuerthner: We have no objection.

Mr. Cyr: It may be we will need some notice,

your Honor, that is the reason we are asking that. We may have to find out what the testimony was.

Mr. J. Wuerthner: And you are requesting 40 days?

The Court: 40 days after receipt of the transcript of testimony.

Mr. Julius Wuerthner: Your Honor, we don't need [226] that much time after receipt of the transcript.

Mr. Cyr: Then we wouldn't need only 20 days after receipt of the transcript.

Mr. Julius Wuerthner: That is satisfactory.

The Court: Very well, 20 days on a side and 10 days to reply if reply is necessary.

(Adjournment 12:25 P.M., January 19, 1956.)

[Endorsed]: Filed Nov. 18, 1957.

[Endorsed]: No. 15834. United States Court of Appeals for the Ninth Circuit. Robert Aiken, L. A. Wollam, Bernard W. Anderson and Lloyd Campbell, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: December 9, 1957.

Docketed: December 30, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15834

ROBERT AIKEN, et al., Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ADOPTION

Comes Now the above-named Appellant, by and through his Attorneys, Wuerthner & Wuerthner, and hereby adopts the Statement of Points, dated December 9th, 1957, and the Designation of the Transcript dated November 22nd, 1957, as previously filed herein.

Dated this 13th day of January, 1958.

WUERTHNER & WUERTHNER,
/s/ By JOHN P. WUERTHNER,
Attorneys for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed Jan. 15, 1958. Paul P.
O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

ROBERT AIKEN, L. A. WOLLAM, BERNARD W. ANDERSON
AND LLOYD CAMPBELL, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES, APPELLEE

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FILED

JUN - 6 1958

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Summary of argument.....	12
Argument	14
I. The district court correctly held the defendants agreed by their contracts to pay the assessments levied against irrigable lands	14
A. The 1944 lease and related documents clearly gave rise to an implied condition to pay the assessments levied on irrigable land and the 1946 lease expressly called for the payment of the assessments	14
B. The decision of the district court did not re- form the contracts, or vary the terms of the written documents.....	18
C. Federal appellate courts do not retry factual issues or substitute its judgment on such issues for that of the trial court.....	20
D. The obligation to pay operation and main- tenance assessments was not dependent on actual use of water.....	23
E. The enforcement and interpretation of the contracts are governed by federal rather than state law	24
II. Appellants were not relieved of their obligations to pay assessments by statutes of limitations, laches, or failure of agents to enforce valid debts owing to the government	26
Conclusion	30
Cases:	
<i>American Houses v. Schneider</i> , 211 F.2d 881.....	25
<i>Baker v. W. J. Kennedy Dairy Co.</i> , 77 F.2d 574.....	20
<i>Chanslor-Canfield Midway Oil Co. v. United States</i> , 266 Fed. 145	27

Cases—Continued

	Page
<i>City of Harlan, Iowa v. Duncan Parking Meter Corp.</i> , 231 F.2d 840	20
<i>City and County of San Francisco v. United States</i> , 233 F.2d 737, cert. den. 350 U.S. 903.....	28, 29
<i>Clearfield Trust Co. v. United States</i> , 318 U.S. 363.....	25
<i>Diamond Alkali Co. v. P. C. Tomson & Co.</i> , 35 F.2d 117	17
<i>Duncan v. United States</i> , 32 U.S. (7 Pet.) 433.....	25
<i>F.C.I.C. v. Merrill</i> , 332 U.S. 380.....	23
<i>Flannagan v. United States</i> , 145 F.2d 740.....	23
<i>Gamewell Co. v. City of Phoenix</i> , 216 Fed. 2d 928.....	22
<i>General Casualty Co. v. School District No. 5</i> , 233 F.2d 526	21
<i>Girard Trust Co. v. United States</i> , 149 F.2d 872.....	25, 26
<i>Glen Falls Indemnity Co. v. United States</i> , 229 F.2d 370	21
<i>Great Lakes, etc. Co. v. Scranton Coal Co.</i> , 239 Fed. 603	17
<i>Hycon Mfg. Co. v. H. Koch & Sons</i> , 219 F.2d 353.....	21
<i>Indemnity Ins. Co. of North America v. Sloan</i> , 68 F.2d 222	20
<i>Jones v. United States</i> , 195 F.2d 707.....	29
<i>Lew Wah Fook v. Brownell</i> , 218 F.2d 924.....	21
<i>Merriam v. United States</i> , 107 U.S. 437.....	20
<i>Mobile & Montgomery R. Co. v. Jurey</i> , 111 U.S. 584....	20
<i>Montrose Contracting Co. v. Westchester County</i> , 94 F.2d 580	17
<i>Nevada Half Moon Mining Co. v. Combined Metals Re- duction Co.</i> , 176 F.2d 73	17
<i>Northeast Clackamas C.E. Co-op. v. Continental Casu- alty Co.</i> , 221 F.2d 329.....	16
<i>Operators Oil Co. v. Barbre</i> , 65 F.2d 857.....	20
<i>Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.</i> , 178 F.2d 541.....	20
<i>Ruud v. American Packing & Provision Co.</i> , 177 F.2d 538	21
<i>Sacramento Nav. Co. v. Salz</i> , 273 U.S. 326.....	16
<i>Texas Industries v. Brown</i> , 218 F.2d 510.....	16
<i>United States v. Ahtanum Irrigation District</i> , 236 F.2d 321	28
<i>United States v. Allegheny County</i> , 322 U.S. 174.....	25
<i>United States v. California</i> , 332 U.S. 19.....	28

Cases—Continued

	Page
<i>United States v. City and County of San Francisco</i> , 310 U. S. 16	28
<i>United States v. Independent School District No. 1</i> , 209 F.2d 578	26
<i>United States v. Jones</i> , 176 F.2d 278.....	25
<i>United States v. Latrobe Construction Co.</i> , 246 F.2d 357	25
<i>United States v. Minnesota</i> , 270 U.S. 181.....	28
<i>United States v. Sharp</i> , 216 F.2d 602.....	29
<i>United States v. Standard Oil Company of California</i> , 332 U.S. 301.....	25
<i>United States v. State of Washington</i> , 233 F.2d 811.....	28
<i>United States v. Summerlin</i> , 310 U.S. 414.....	28
<i>Utah v. United States</i> , 284 U.S. 534.....	28
<i>Utah Power & Light Co. v. United States</i> , 243 U.S. 389..	27
<i>Watson Bros. Transp. Co. v. Jaffa</i> , 143 F.2d 340.....	17
<i>W. C. Shepherd Co. v. Royal Indemnity Co.</i> , 192 F.2d 710	20
<i>Woodward v. United States</i> , 167 F.2d 774	25

Statutes:

25 C.F.R.:

Sec. 171.11	23
Sec. 171.26	23

28 U.S.C.:

Sec. 1291	1
Sec. 1345	1

Miscellaneous:

Rule 52a, F.C.Civ.P.	21
Kinney on Irrigation and Water Rights, Sec. 1422.....	23
Williston, on Contracts, Sec. 670.....	16

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15834

ROBERT AIKEN, L. A. WOLLAM, BERNARD W. ANDERSON
AND LLOYD CAMPBELL, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MONTANA*

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The decision of the district court (R. 46-52) is not reported.

JURISDICTION

This is an appeal from the judgment of the district court entered October 31, 1957. Notice of appeal was filed November 22, 1957. The jurisdiction of the district court of this suit by the United States rested on 28 U.S.C. sec. 1345. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether a lease of lands within an Indian Irrigation Project obligated the lessee to pay irrigation op-

eration and maintenance assessments as required by regulations of the Department of the Interior regardless of whether water was actually demanded.

2. Whether the United States lost its right to the debt due on the assessments because of failure to press collection efforts in the most expeditious manner.

STATEMENT

This suit was brought by the United States in August 1952 to collect delinquent charges and accrued interest assessed against Indian lands leased to defendant, Robert Aiken. These charges were for the purpose of paying operation and maintenance costs of the Blackfeet Indian Irrigation Project, Montana, where the leased lands were located (R. 3-10). The leases are of allotted lands within the Blackfeet Reservation and are executed by the allottees as lessors and non-allottee farmers as lessees. These charges are required by regulations issued pursuant to statute by the Secretary of the Interior and were published originally on May 28, 1942, in section 171.26 of Title 25, C.F.R., 7 F.R. 3958. The regulations now appear at 25 C.F.R. sec. 171.11. They require any lessee within an irrigation project to pay, in the amounts determined by the Secretary or his representative, the operation and maintenance charges, including penalties, assessed against the irrigable acreage of the lease.

The complaint states two causes of action: The first is for delinquent charges under a lease made in 1944, and the second cause of action is based upon delinquent charges from a 1946 lease. The defendants' answer puts at issue, insofar as this appeal is concerned, whether the leased lands were in fact irrigable, whether the parties did or had intended to contract with re-

spect to irrigable lands or dry farm lands, and whether the United States had waived its rights to recover the operation and maintenance charges (R. 38-46).

The 1944 invitation to bid, the 1944 bid and both leases are found in the record, pp. 10-37. The 1944 invitation to bid contained this pertinent provision (R. 11):

In the irrigable area, at least one year of the five must be allotted to the use of a legume such as alfalfa or sweet clover. Where it is necessary to practice weed eradication by summerfallow, the lessee may do so, and *there will be no charge for water. But this elimination of water charge may be for one year, only, out of five.* * * * Dry land farming is prohibited in this area and *the water rental is payable in advance.*¹

Mr. Aiken's 1944 acceptance bid was unqualified (R. 14). The 1944 lease, on an April 1929 printed Form 5-180a, had this provision typed on its face (R. 16):

All land to be farmed as irrigated farm land on a crop rotation basis. This rotation must consist of at least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown in time to permit sufficient growth for winter cover. * * * If it is shown to be necessary to practice weed eradication for one year only out of 5, *water charges will not be required for that year if water is not used.*

The 1946 lease, on an August 1943 printed Form No. 5-180, had this provision typed on its face (R. 33):

¹ Emphasis supplied throughout this brief.

*All land to be farmed as irrigated farm land on a crop rotation basis. This land must consist of at least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown by August 20th in time to permit sufficient growth for winter cover. * * * Irrigation water assessment to be paid at same time rental is paid.*

Also the 1946 lease contained in the printed part of the form this provision (R. 33):

6. Operation and Maintenance.—It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties, accruing against the above-described land under irrigation, pursuant to the existing or future orders of the Secretary of the Interior (Title 25—Indians, CFR, part 130).

The case came on for trial in January, 1956. The district court filed its written decision on September 4, 1957, in which it held that the United States had established the material allegations of the complaint and that judgment should be accordingly awarded to it (R. 46-52). Findings of fact, conclusions of law and the judgment followed on October 31, 1957 (R. 52-59). The district court found that the lands were at all times included within the Blackfeet Indian Irrigation Project (R. 53). The district court's decision took notice of the basic regulation, of which the defendant was charged with knowledge, providing that leases of Indian lands within an irrigation project

shall require the lessee to pay the operation and maintenance charges, including penalties assessed against the irrigable acreage of the lease (R. 46-47).

The district court found that the defendants had covenanted and agreed to pay all operation and maintenance assessments levied against the leased lands (R. 53-54). It was held that the advertisement for the 1944 lease made it plain to the bidder what liability he would incur if he leased land in the irrigable area (R. 48-49). The district court further held that "it is clearly expressed that defendant under both leases was required to farm the lands as irrigated lands on a crop rotation basis; in other words, that an irrigated farm operation was required of the defendant" (R. 49). The court later continues, "there seems to be no question that this irrigation project contained a system of canals and irrigation ditches * * * for the use of this defendant under his leases, and while there is conflict in the testimony as to the feasibility of irrigating some of this leased land, as it appears to the Court from the evidence, irrigation facilities were available to the lessee" (R. 50).

The district court held the defendants entered these leases knowing the character of the soil, the nature and extent of the irrigation system and the existing conditions and regulations governing the use of lands under the project, knowing that dry land farming was prohibited and that operation and maintenance charges were required to be paid (R. 50-51). The district court stated in its opinion that it did seem that a serious oversight or neglect had taken place for which government agents were responsible after so many years had elapsed before a demand for payment. However, the court concluded, after a review of the facts,

that it felt obliged to hold that the defendant must have been fully aware of the extent of his liability, and there did not appear to be any valid reason for depriving the Government and the Indian allottees of the indebtedness due under the leases (R. 51-52).

The evidence at the trial upon which these findings and conclusions were based may be summarized as follows: Mr. Paul G. Anspach, retired project engineer for the Blackfeet Irrigation Project, testified generally on the irrigation facilities available to the leased land and other background information on the operation and maintenance charges. Mr. Anspach identified as plaintiff's exhibits, No. 1, a map of the area (R. 68); No. 2, the status account of the irrigable acreage and water charges for Mr. Aiken's 1944 lease, which had been originally made in 1944 with amounts entered as they became due (R. 75); No. 3, the same status account for the 1946 lease (R. 77); and No. 4, a copy of the statement of charges mailed to Mr. Aiken (R. 79). Mr. Anspach was project engineer from 1938 to 1950 (R. 80). In this capacity Mr. Anspach had by personal observation and work on the irrigation system become thoroughly familiar with the land in the project (R. 80, 81, 82, 100, 104, 135, 141-142). Mr. Anspach had been over the land leased by Mr. Aiken prior to the time he leased it (R. 80). He had been over the land many times in surveys and the locations of ditches (R. 100). Mr. Anspach inspected the irrigation ditches, determined whether they would hold water and whether they should be cleaned (R. 104). Mr. Anspach identified plaintiff's exhibit No. 7, the official project map, and testified that he had personally made surveys based on that map which showed the things indicated on the map conformed to

the actual physical facts and that he knew from his own experience and observation that the map was accurate (R. 134, 135, 141-142).

Mr. Anspach had assisted in laying out and supervised construction of the major and minor laterals in the project (R. 81). The major and minor laterals which serve the lands leased by Mr. Aiken were constructed while Mr. Anspach was project engineer (R. 82). They were built in 1941, prior to Mr. Aiken's lease, and were physically located and constructed at the time of Mr. Aiken's 1944 and 1946 leases (R. 83). The water was delivered to the highest points on the land (R. 84). There were several points for delivery of water to the lands leased by Mr. Aiken (R. 83-84). In making the charges, the privilege of summer fallow, for which no charge was made, was allowed the first year of each lease, i.e., no water charge was made in 1944 under the 1944 lease nor in 1946 under the later lease (R. 89-90). Mr. Anspach identified the termini of the irrigation ditches serving Mr. Aiken's leases (R. 97-98). Mr. Anspach testified that the land involved in the leases was irrigable. Irrigability was decided on the basis of a survey made in 1931 and 1932 to determine the irrigability of all tracts in the project (R. 105). The irrigation project was under a duty to deliver water to the farm, but the individual farmer has the obligation of distributing it over the several acres of his holdings (R. 120-121). It was the policy of the project to notify everybody of any unpaid water charges for the previous year in October. If the delinquent charges were not paid by October 31, they were subject to a penalty (R. 123).

The next government witness, Mark W. Stout, is the project engineer who succeeded Mr. Anspach when

he retired in 1950. Mr. Stout identified plaintiff's exhibits Nos. 2, 3 and 4 as part of the official records of his office (R. 84-85).

Mr. Frank Kuka was the following witness. Mr. Kuka is a ditch rider for the Badger-Fisher Blackfeet project, a position he has held for 26 years (R. 147). Mr. Kuka marked on the map, plaintiff's exhibit No. 7, the furthestest points where water was delivered in the major and minor laterals during the time Mr. Aiken had his leases (R. 148-150). Mr. Kuka's testimony was based on his personal observation of the irrigation ditches in the project and he testified as to the specific points he had observed water in the ditches during the years Mr. Aiken had his leases (R. 148-149).

The final witness for the Government was Mr. Charles S. Spencer, Superintendent of the Blackfeet Indian Reservation since 1954 (R. 159). Mr. Spencer identified plaintiff's exhibit No. 8, a copy of the statement mailed to Robert Aiken on January 2, 1948, showing O & M charges due plus interest to January 31, 1947. Mr. Spencer also identified plaintiff's exhibit No. 9, a similar statement mailed to Mr. Aiken about March 23, 1951 (R. 160-163). Mr. Spencer explained that for reasons unknown to him the 1929 form was used in lieu of the 1943 form which should have been used for the 1944 Aiken lease. Mr. Spencer also pointed out the provision in the 1946 lease, which used the 1943 form, requiring payment of O & M charges (R. 167-169).

The first witness for the defendants was Henry L. Henneman who had succeeded Mr. Aiken as lessee (R. 173). Mr. Henneman leased all the irrigated land in the 1946 Aiken lease and all the land in the 1944 Aiken lease except six 40-acre tracts (R. 174). The two

40-acre tracts, the only irrigable land in the 1946 Aiken lease, were leased to Henneman beginning in 1951. The 1951 Henneman lease called for O & M charges. However, at Henneman's request a redetermination was made that, due to the cost of irrigation, the Government was willing to lease the land for dry farming. Accordingly, the O & M charges were taken off the lease and charges previously paid were refunded (R. 191-193).

Henneman held the lease of the north half of the southeast quarter of Section 30 at the same time Aiken held the south half of the same quarter. To use terminal 3 to get to the half of the quarter leased by Aiken it would be necessary, Henneman testified, to cross the part leased by him. However, Henneman testified there was an alternate method of irrigation from terminal 4 (R. 189-190).

Mr. Henneman testified that he had never paid O & M charges under his 1949 lease on the land which had been previously leased to Aiken under the 1944 lease. O & M charges were not payable under this express provision of the lease: "Rentals to be increased by 75¢ per acre on irrigated lands when irrigation service is established; lessee to notify the Blackfeet Indian Office immediately when such service is furnished" (R. 193-194).

On cross-examination, Mr. Henneman admitted that the reason for the refund of water charges on the 1951 lease was that the irrigation ditches had blown full of dirt (R. 197). Mr. Henneman further testified that he now (January 1956) pays O & M charges on the lands covered by his 1949 lease (R. 194-195).

Mr. Frank Kuka, who had previously testified, was called by the defendants. Mr. Kuka stated that the

reason why the land covered by the 1951 Henneman lease could not be irrigated was the summer fallowing Mr. Henneman had done. It caused the ditches to be filled with dirt beyond the high point, although apparently the water could have been delivered to the high point (R. 199-200). Mr. Kuka testified that prior to 1951 this land had been subject to irrigation (R. 204).

The next witness for the defendants was Clarence Parlemee, a rancher who resided in the vicinity of the leased land and was familiar with it (R. 205). Mr. Parlemee testified generally to farming methods on the leased lands and in the vicinity, operation and condition of the irrigation system, and the fact that all his operations were dry land farming (R. 206-212). On cross-examination Mr. Parlemee testified that although he did not use water for irrigation on the land leased in the Blackfeet Irrigation Project he had to pay the O & M charges anyway (R. 214).

Defendants presented the testimony of Lloyd Campbell, Henry L. Henneman and Robert Aiken to show the method of farming, strip farming, during the period Mr. Aiken had the leases (R. 214-232). Mr. Campbell was the chairman of the Pondera County allotment program and farmed about 15 miles from the land in controversy. He had no personal acquaintance with condition of the land during the term of the Aiken leases (R. 216-219).

The final witness was the defendant, Robert Aiken. Mr. Aiken testified he leased 440 acres of the same land in Section 30 prior to the 1944 lease (R. 233-234). He testified that he first came on the land in 1939 without any lease (R. 234). Mr. Aiken testified that he submitted his bid after he had read the notice of the bids

for farming and grazing leases, and that the notice did not specify whether the land was irrigable or not (R. 235-236). He had farmed the land as dry land for five years prior to the 1944 lease (R. 236). Mr. Aiken testified there had been no demand made on him for water rental until around 1950 (R. 236, 238). Mr. Aiken admitted that the leased lands were irrigable from the system of ditches present but maintained that water could not be brought in sufficient quantity for irrigation (R. 237). It was impractical, Mr. Aiken testified, because grain can be irrigated to advantage only about 10 days of the year and "there isn't ditch enough to handle enough water to irrigate that much" (R. 236).

On cross-examination Mr. Aiken admitted that he had received notice of delinquent O & M charges some time prior to February 1949. Defendants accordingly moved to amend their answer, wherein it had been denied that any demand had been made until suit was filed, to conform to the proof (R. 40, 244-245). Mr. Aiken further testified on cross-examination that part of the land in the 1944 lease had been farmed prior to the 1944 lease under an assignment of a lease. The prior lease and assignment were identified and introduced in evidence as plaintiff's exhibits Nos. 14 and 15. The prior lease had provided that the lessee agrees to pay O & M and construction charges as to irrigation, and Mr. Aiken knew, he admitted, that the land could be irrigated "if you wanted to" (R. 246-250). Mr. Aiken testified he knew the land was part of the Badger-Fisher project and that the irrigation ditches were on his property (R. 250).

From the decision and judgment of the district court this appeal followed.

SUMMARY OF ARGUMENT

The principal issue in this case is whether the lessee, Robert Aiken, has agreed in his leases to pay the water assessments. An examination of the lease documents shows clearly that such a promise is contained in both the 1944 and 1946 leases. Both the 1944 invitation to bid and the 1944 lease provide in substance that charges for water are payable on all irrigable land, and that water charges may be eliminated for one year only out of five if no water is used in summer fallowing. These clearly imply the promise to pay the charges for the other four years. Otherwise the language is meaningless. No specific form of words is necessary where it is clear the parties intended an obligation. The courts will enforce promises fairly to be implied from the language of the contract when construed in view of the circumstances present at the time of making. The action of the district court in the case below was simply an enforcement of the obligation to pay water charges clearly implied in the 1944 lease. The 1946 lease contains an express obligation to pay operation and maintenance assessments which requires no discussion.

Appellants' extended discussion about reformation and varying the terms of a written instrument is immaterial under the facts of this case. There has been no reformation by the district court nor was there a variation of a written instrument by parole evidence. The parole evidence argument fails to distinguish between evidence explaining the terms of an agreement and evidence that seeks to contradict express terms. It is a fundamental rule in the construction of contracts that the court may avail itself of the information which the parties possessed to determine the intent

at the time the contract was made. Ascertainment of this information does not offend the parole evidence rule.

Appellants attack the findings of the district court on (1) whether the leased lands could be irrigated and (2) whether Mr. Aiken knew he was obligated to pay the assessments. The district court found in the affirmative on both these issues. This Court, as a federal appellate court, will not retry the factual issues *de novo* from the record. If the findings are sustained by substantial evidence, they must be affirmed. The evidence overwhelmingly supports the district court on both these factual issues.

The obligation to pay the water assessments was independent of the actual use of water. This obligation is based on the very valid reason that the costs of operating an irrigation project do not vary proportionately to the amount of water used, and it would be impossible to operate a project solvently if the individual farmer could determine the amount of water used. But, irrespective of reasonableness, the water assessments were required, without reference to amount of water used, by Department of the Interior regulations published in the Federal Register. Appellants were thus charged with constructive notice of these regulations, and, further, the evidence supports the district court's findings that Mr. Aiken had actual notice of the requirement to pay these charges. The record shows other farmers were required to pay these charges even though no water was used. It is, thus, not a question of a special obligation being placed on Mr. Aiken.

The leases and bonds at issue in this suit were made pursuant to authorization and requirements of federal

law. They are, therefore, construed and enforced in accordance with federal law, with state law being applicable only insofar as it is deemed appropriate in absence of controlling decisions in federal courts.

Even after it has been shown that there was an obligation to pay the operation and maintenance assessments under the leases, appellants further contend the United States has lost the right to collect the debt because the federal agents did not insist upon payment "in advance or at any time during the leases." While it is recognized that the lapse of time indicated in the record may be more than condoned by good business practice, the delay is not so great as suggested. In any event, the rule announced both by this Court and the Supreme Court is that laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. This rule applies especially where the United States is acting in a trustee capacity for the Indians. Certainly a delay in billing of at most a little over two years cannot affect the Government's rights to collect its debts.

ARGUMENT

I

The District Court Correctly Held the Defendants Agreed by Their Contracts to Pay the Assessments Levied Against Irrigable Lands

*A. The 1944 lease and related documents clearly gave rise to an implied condition to pay the assessments levied on irrigable land and the 1946 lease expressly called for the payment of the assessments:—*The principal issued before the trial court was whether the

appellant, Robert Aiken, as lessee had agreed to pay the water rental assessments for the land under lease. It remains the principal issue on this appeal, and the *sine qua non* to the discussion of all other aspects of the appeal. It is apparent from appellants' brief that the crux of their argument on this appeal is that Mr. Aiken never made an enforceable promise to pay such assessments. All their discussion about lack of evidence to justify reformation, about mutual and unilateral mistake, about varying the terms of a written instrument, and about "obsolete" forms is premised on the assumption that the 1944 lease documents do not contain a promise to pay the water assessments on irrigated farmland. Such assumption is plainly erroneous, as the trial court holds. A brief examination of the documents in question shows why. Typed on the face of the 1944 lease is the provision that all land in the lease was to be farmed as irrigated farmland, and that for one year only out of five, no water charges would be made if no water was used in weed eradication (R. 16). If, after the declaration that the land must be farmed as irrigated land,² the lease specifically states that water charges will not be required one year *only* out of five, the condition is implied as clearly as it can be that water charges *must be paid the other four years*. Otherwise, this provision is meaningless since an exception from charges becomes operative only if charges would otherwise be owing. Appellants would simply read this provision out of the contract. Further, this lease was made pursuant to an invitation to bid which also plainly stated that in the irrigable area water

² Generally, in the western irrigation areas, lessees of land within irrigation project areas expect to pay charges.

rental was payable in advance and that there may be an elimination of the water charge "for one year, only, out of five" (R. 11). Mr. Aiken's bid pursuant to this invitation did not condition or vary these terms in any respect (R. 14). And it could hardly be argued in view of what has been set out above that the lease document itself does so.

It can be seen, then, that one need look no further than the basic lease document itself to find the promise to pay water assessments. In discussing the words necessary to create a promise, Williston, on Contracts, Sec. 670 (revised ed., 1936), says:

[n]o form of words is necessary to create a promise or covenant; all that is essential is that on a fair interpretation it shall appear that the alleged promisor has agreed to do the act in question. Not only may promises exist, then, where the language is in terms that of promise, but also where the agreement shows that the parties must have intended an obligation though they failed so to state in clear terms. These promises, implied in fact, as they may be called, are numerous. [Citing examples.]

The doctrine that a court will enforce conditions and promises fairly to be implied from the language of a contract when construed in view of the circumstances present at the time of making has been widely adopted by the federal courts, including this Court, in a variety of situations. Some of the many examples may be found in *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 329 (1927); *Northeast Clackamas C.E. Co-op v. Continental Casualty Co.*, 221 F.2d 329, 334 (C.A. 9, 1955); *Texas Industries v. Brown*, 218 F.2d 510, 512 (C.A. 5, 1955);

Nevada Half Moon Mining Co. v. Combined Metals Reduction Co., 176 F.2d 73, 75 (C.A. 10, 1949); *Watson Bros. Transp. Co. v. Jaffa*, 143 F.2d 340, 347-348 (C.A. 8, 1944); *Montrose Contracting Co. v. Westchester County*, 94 F.2d 580, 582 (C.A. 2, 1938); *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 F.2d 117, 120 (C.A. 3, 1929); *Great Lakes, etc. Co. v. Scranton Coal Co.*, 239 Fed. 603, 607 (C.A. 7, 1917). The opinion in the *Nevada Half Moon Mining Co.* case, *supra*, enforcing an implied covenant to pay royalty on subsidy payments where such payments were not expressly mentioned in the contract, states (p. 75):

The cold language contained in a written agreement, standing alone, is not always controlling. (Citing authority.) That which is necessarily implied in a contract is as much a part of it as though expressly stated therein, but the implication must result from the language employed in the instrument and be indispensable to carry the intention of the parties into effect. If it is clear from all the pertinent parts or provisions of the contract taken together and considered in the light of the facts and circumstances surrounding the parties at the time of its execution, that the obligation in question was within the contemplation of the parties or was necessary to carry their intention into effect, it will be implied and enforced. (Citing authority.) And a contract should not be so narrowly or technically interpreted as to frustrate its obvious design or so loosely construed as to relieve a party of an obligation or liability fairly within its scope or spirit. (Citing authority.)

When the District Court had seen all the pertinent parts or provisions of the contracts and considered them in the light of the facts and circumstances surrounding the parties at the time of their execution it made the obvious and reasonable holding. The court concluded in its decision of September 4, 1957, that “after a review of the facts—the lease, the advertisement, the bid, the prohibition against dry land farming, the requirement that water charges must be paid, the leasing of lands under an irrigation project supplied with canals and ditches, defendant’s familiarity with existing conditions, the Court feels obliged to hold, under all the evidence, that defendant must have been fully aware of the extent of his liability under those two contracts of lease of irrigable Indian lands * * *” (R. 51-52).

The obligation to pay the operation and maintenance assessments under the 1946 lease is so express and unequivocal as to require no discussion. See paragraph 6 of this lease set out at page 33 of the record. Appellants are apparently of the same view (Br. 16).

B. The decision of the district court did not reform the contracts, or vary the terms of the written documents:—The appellants’ extended argument about reformation of the lease and varying the terms of a written instrument is immaterial under the facts of this case and we shall not burden the Court with a discussion of the law involved in that subject. There has been no reformation of a lease in this case. The obligation to pay water assessments is clearly implied in the language of the 1944 lease itself and this was all the trial court decided. Appellants insinuate this is a case of reformation by saying the trial court’s finding of fact “in effect” reformed the 1944 lease (Br. 16). Yet

one searches in vain in the trial court's decision, findings of fact, conclusions of law and judgment for a holding or even a mention that the 1944 lease should be reformed. The trial court made none of the findings which anybody familiar with no more than the rudiments of law would know must be made to justify reformation, e.g., that there was a mutual mistake, or a unilateral mistake with the other party knowing or suspecting, or fraud. There is absolutely nothing in the decision and findings of fact saying how the 1944 lease was incomplete or what provision should be added by appellants' spectral "reformation".

Just as the enforcement of an obligation clearly implied in a contract is not a reformation of that contract, neither is it a variation of a written instrument by parole evidence. For this reason appellant's argument that the decision of the trial court "in effect" varies the terms of a written instrument by parole evidence is also untrue (Br. 22). It is not clear from their brief just what "parole evidence" appellants are objecting to. The United States is unaware of any evidence in the record which might offend the parole evidence rule unless it was appellants' own assertion that the land was not irrigable in the face of the express provisions in the contracts that it was to be farmed as irrigated land (R. 16, 33). The appellants' argument is probably based on a failure to distinguish between evidence explaining the terms of the agreement and evidence that seeks to contradict or vary the express terms or set up in addition an unrelated agreement which cannot be fairly implied from the contract. It is a fundamental rule in the construction of contracts that the court may look at the surrounding circumstances and may avail itself of the information

which the parties possessed to determine the intent at the time the contract was made. *Merriam v. United States*, 107 U.S. 437 (1882); *Mobile & Montgomery R. Co. v. Jurey*, 111 U.S. 584, 591 (1884); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F. 2d 541, 552 (C.A. 9, 1949); *City of Harlan, Iowa v. Duncan Parking Meter Corp.*, 231 F. 2d 840, 842 (C.A. 8, 1956); *W. C. Sheperd Co. v. Royal Indemnity Co.*, 192 F. 2d 710, 715 (C.A. 5, 1951); *Baker v. W. J. Kennedy Dairy Co.*, 77 F. 2d 574, 576 (C.A. 6, 1935); *Indemnity Ins. Co. of North America v. Sloan*, 68 F. 2d 222, 228 (C.A. 4, 1934); *Operators Oil Co. v. Barbre*, 65 F. 2d 857, 860 (C.A. 10, 1933). The rule is amply supported also in cases cited in the trial court's opinion (R. 49-50). The trial court looked at the language of the contract and at the circumstances and information the parties had at the date of making. From this it determined what the contract meant. This procedure is proper and in accordance with the applicable principles of law, and appellants are in error in trying to make it either a reformation or parole variance of the contract.

The discussion in this point has been limited to the 1944 lease. It is unnecessary to discuss the 1946 lease since appellants admit that it explicitly contained the provision for payment of operation and maintenance assessments (Br. 16).

C. Federal appellate courts do not retry factual issues or substitute its judgment on such issues for that of the trial court:—Interspersed in appellants' brief there recurs an attack on the findings of the trial court on these two purely factual questions: (1) whether the leased lands could be irrigated and (2) whether the defendant Aiken knew he was obligated to pay the assess-

ments for the irrigation project. The trial court has found in the affirmative on both these issues (R. 50, 51-52). If appellants now want to attack the findings of the trial court the burden of proof is on them to point out specifically where these findings are clearly erroneous, and mere assertion does not shift the burden. *Glen Falls Indemnity Co. v. United States*, 229 F. 2d 370, 373 (C.A. 9, 1955). This Court, as a federal appellate court, will not retry the factual issues in the case *de novo* from the record. *Lew Wah Fook v. Brownell*, 218 F. 2d 924, 925 (C.A. 9, 1955). Nor will this Court substitute its judgment for that of the trial court. *General Casualty Co. v. School District No. 5*, 233 F. 2d 526, 527-528 (C.A. 9, 1956). No authority is given except to the district courts to make new findings of fact. *Hycon Mfg. Co. v. H. Koch & Sons*, 219 F. 2d 353, 355 (C.A. 9, 1955). If the findings are sustained by substantial, competent evidence they must be affirmed. *Ruud v. American Packing & Provision Co.*, 177 F. 2d 538, 540 (C.A. 9, 1949). The findings of the trial court are presumptively correct and must be sustained unless clearly erroneous. Rule 52a, F.R. Civ. P.; *General Casualty Co. v. School District No. 5*, *supra*; *Glenn Falls Indemnity Co. v. United States*, *supra*; *Hycon Mfg. Co. v. H. Koch & Sons*, *supra*; *Lew Wah Fook v. Brownell*, *supra*; *Gamewell Co. v. City of Phoenix*, 216 Fed. 2d 928, 931 (C.A. 9, 1954); *Ruud v. American Packing & Provision Co.*, *supra*. There can be no serious question, as the trial court found, that irrigation facilities were available to the land leased by Mr. Aiken. The evidence overwhelmingly supported this conclusion. Mr. Aiken, himself, testified to this fact when he said in answer to the question whether he knew the land was irrigable,

that he knew one could have ordered water and paid for it "if you wanted it" (R. 249). And, later: "Q. But in any event you knew that land was subject to irrigation? A. I knew it could be irrigated" (R. 250). The leases that Mr. Aiken signed clearly stated in typing on the front of the lease form that all the leased land was "to be farmed as irrigated farm land * * *" (R. 16, 33). These leases were accepted without protest. The official land map showed the lands were irrigable (R. 105, 134-135). The government witnesses Anspach and Kuka testified the lands in question were irrigable. (See, *supra*, for summary of testimony, pp. 6-8.)

Against this preponderance of direct evidence, appellants snipe at such ancillary matters as the type of soil and whether in the personal opinion of a particular farmer the land was more suitable for irrigation or strip farming (Br. 16-18). There might be a difference of opinion, of course, among persons familiar with the subject matter whether a particular parcel of land, under all the circumstances, was better suited for dry farming or irrigation. It is not, in any event, for the court to determine in this case whether dry farming or irrigation farming is the best use of the land. The trial court that heard all the evidence on both sides held that the irrigation facilities were available to Mr. Aiken and that he knew the extent of his liability under the contracts (R. 50, 52). If Mr. Aiken had any doubts about the irrigability of this land, he might have raised the issue before he entered his leases. It is hardly appropriate now, however, to ask this Court to reweigh the evidence and reach a different conclusion from that of the trial court's when its findings are

plainly supported by the preponderance of the evidence.

D. The obligation to pay operation and maintenance assessments was not dependent on actual use of water:—That the lessee did not use any water does not excuse him from his obligation to pay operation and maintenance charges. The leased Indian land being within the irrigation project the Code of Federal Regulations requires that the provision for payment of these charges in the amount prescribed by the Secretary of Interior be included in the lease. 25 C.F.R. sec. 171.26, promulgated by the Secretary of the Interior May 2, 1942; 7 F.R. 3958; same regulation now appears at 25 C.F.R. sec. 171.11. The regulation does not condition payment on the amount of water received, or on receiving any water, for very valid reasons. This assessment was for the purpose of running the entire project. The expenses for an irrigation project are largely fixed and do not vary at all proportionately to the amount of water delivered. It would be impossible to operate the irrigation project solvently if each farmer could decide for himself whether he would participate.³

But, irrespective of the reasonableness, the regulation was validly published in the Federal Register and appellants were charged with constructive notice of the provisions, even assuming they had no actual notice, that they were required to pay operation and maintenance charges. *F.C.I.C. v. Merrill*, 332 U.S. 380, 384 (1947); *Flannagan v. United States*, 145 F. 2d 740, 741 (C.A. 9, 1944).

³ State irrigation districts likewise generally assess operation and maintenance charges in the same manner as other taxes against all property in the irrigation project without regard to actual water use. See Kinney on Irrigation and Water Rights, (2d Ed., 1912) Section 1422.

Moreover, there is ample evidence in the record to support the finding of the trial court that the appellant, Aiken, did have actual notice of the obligation of leaseholders under the irrigation project to pay operation and maintenance charges (R. 51). The invitation to bid gave actual notice when it stated of the irrigable area that, "Dry land farming is prohibited in this area and the water rental is payable in advance" (R. 11). And, as we have shown above, the language in the lease was enough to give notice that water rentals would be payable for four years of the lease term (*supra*, pp. 15-16).

Further, it was shown at the trial that payment of the operation and maintenance assessment without actual use of water is not a special burden being placed on Mr. Aiken alone. Generally the lessees in the area must fulfill this obligation. Mr. Parlemee testified he had to pay the assessment even though he used no water (R. 214). Mr. Henneman now pays operation and maintenance charges, although he has never used any water (R. 194-195, 177). Indeed from this record it would appear Mr. Aiken now seeks a special exemption from the payment of these charges which is not available to others similarly situated.

Clearly, then, the obligation to pay operation and maintenance assessments existed without regard to the amount of water used and Mr. Aiken had both constructive and actual notice of this fact. Because he used no water does not and should not prevent enforcement of this obligation.

E. *The enforcement and interpretation of the contracts are governed by federal rather than state law:*—The leases and bonds at issue in this suit were made pursuant to authorization and requirements of federal

law. It is now established beyond doubt that contracts by which the Federal Government executes its constitutional functions and powers such as protection of dependent Indians are construed and enforced by federal law and rights thereunder cannot be limited or modified by state law. As this Court said in *United States v. Jones*, 176 F.2d 278, 281 (1949), quoting from *United States v. Allegheny County*, 322 U.S. 174, 182 (1944) :

Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power.
 * * * The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.

This rule applies to leases as well as any other type of contract. *American Houses v. Schneider*, 211 F.2d 881, 882 (C.A. 3, 1954) ; *Girard Trust Co. v. United States*, 149 F.2d 872, 874 (C.A. 3, 1945). Other cases holding that the validity and construction of contracts in which the United States has an interest are governed by federal law are *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943) ; *Duncan v. United States*, 32 U.S. (7 Pet.) 433 (1833) ; *United States v. Latrobe Construction Co.*, 246 F.2d 357, 360-363, (C.A. 8, 1957) ; *Woodward v. United States*, 167 F.2d 774, 778-779, (C.A. 8, 1948). See *United States v. Standard Oil Company of California*, 332 U.S. 301, 307-308 (1947), for a discussion of the "federal common law" applicable in these cases. In such cases the courts apply federal law and, in the absence of controlling federal statutes or

decisions, the general law on the subject with state law being applicable only insofar as it deemed appropriate as a basis for the federal remedy. *United States v. Independent School No. 1*, 209 F.2d 578, 580 (C.A. 10, 1954); *Girard Trust Co. v. United States*, 149 F.2d 872, 874 (C.A. 3, 1945).

That federal law is controlling is pointed out in view of the exclusive citation of Montana statutory law and Montana decisions in appellants' brief. It is inferred from this, although appellants never specifically state it, that they consider these contracts governed by Montana law. The Montana authorities are, in any event, almost entirely inapplicable to the present case for reasons pointed out elsewhere in this brief. We do not believe that there would be any difference in outcome under Montana law and under federal law and hence no controlling issue as to which law applies is presented.

II

Appellants Were Not Relieved of Their Obligations to Pay Assessments by Statutes of Limitations, Laches, or Failure of Agents to Enforce Valid Debts Owing to the Government

Once it is established that there was an obligation to pay operation and maintenance assessments under the leases, appellants further contend that the United States has lost its right to collect the debt because its agents did not insist "upon payment of the O & M assessments, either in advance or at any time during the leases" (Br. 28-29, 13). The appellee recognizes that on the present record, the lapse of time between the inception of the obligation and demand for payment was greater than is condoned by good business practices. What extenuating circumstances there might be outside the record are not material and will not be argued.

We believe that an examination of the facts in the record will disclose, however, that the lapse of time was not so great as has been suggested. Mr. Anspach testified that an assessment was not made the first year of each lease because of summer fallow (R. 89-90). He further testified that it was the policy to notify everybody in October if they had unpaid water charges for that year or previous years and, if unpaid, the penalty attached only after October 31 (R. 123). The record further indicates that Mr. Aiken was mailed a notice of O & M charges due at least by January 2, 1948 (R. 160-161). At most the delay under the 1944 lease was from October 1945 to January 1948, a little over two years, and under the 1946 lease, the delay was only the few months from October 1947 to January 1948.

Having examined the record to ascertain the exact extent of the delay, let us turn to the legal principles to see whether, in any event, government agents could by their failure to act cause the United States to forfeit an obligation otherwise owing. It is the rule announced both by this Court and by the Supreme Court that laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Chanslor-Canfield Midway Oil Co. v. United States*, 266 Fed. 145, 150 (C.A. 9, 1920). Only recently this Court has said:

The Government which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and

officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

United States v. Ahtanum Irrigation District, 236 F. 2d 321, 334 (1956), quoting from *United States v. California*, 332 U.S. 19, 40 (1947). Even assuming that government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the interests of the Government are not to be forfeited as a result. *United States v. California, supra*. These rules especially apply where the United States is acting in a trustee capacity for the Indians. *United States v. State of Washington*, 233 F. 2d 811 817 (C.A. 9, 1956); *United States v. Ahtanum Irrigation District, supra*. Indeed, where there has been a positive agreement, it has been held that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *United States v. City and County of San Francisco*, 310 U.S. 16, 31-32 (1940); *City and County of San Francisco v. United States*, 223 F. 2d 737, 739 (C.A. 9, 1955), cert. den. 350 U.S. 903. Similarly, oral statements beyond the scope of a government agent's authority do not estop the Government from asserting its rights. *Utah v. United States*, 284 U.S. 534, 545-546 (1932). And of course there is no question that the state statutes of limitations are inapplicable. *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *United States v. Minnesota*, 270 U.S. 181, 196 (1926). Unreasonable delay in instituting an action does not bar the Government from collecting its debts.

United States v. Sharp, 216 F. 2d 602, 604 (C.A. 9, 1954).

Judged by the above line of authorities the facts in the present case could not possibly raise any valid bar to the Government's collection of its just obligations. Nor was the delay in this case unreasonable when compared with other cases where these authorities have been applied. In *Jones v. United States*, 195 F. 2d 707, 709 (C.A. 9, 1952), "agents of the Bureau of Land Management stood idly by while Kelly built the Moose Creek Lodge upon the property in question and for five years permitted the defendant Jones to make additional improvements there without bringing any action or taking any steps to eject him," and it was held that this did not affect the Government's title or right to possession of the property. And in *City and County of San Francisco v. United States*, 223 F. 2d 737, 739 (C.A. 9, 1955), cert. den. 350 U.S. 903, this Court held that the Secretary of the Interior's acquiescence of 10 years before making a claim and 19 years before bringing a suit did not affect a valid obligation owing to the Government. Certainly, a little over, at most, two years cannot affect the Government's right to collect its debts.

Therefore, under the controlling rules of law, the trial court was correct in holding:

* * * under all the evidence, that defendant must have been fully aware of the extent of his liability under those two contracts of lease of irrigable Indian lands, although the Superintendent of the reservation, or some one qualified to act in his behalf, may have been negligent in not collecting these charges when they were due and payable under the contracts. This does not appear to af-

ford any valid reason for depriving the Government and the Indian allottees of collecting the indebtedness due under the leases. (R. 52).

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the district court is correct and should be affirmed.

Respectfully,

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MAY 1958.

IN THE
United States
Court of Appeals
for the Ninth Circuit

ROBERT AIKEN, L. A. WOLLAM, BERNARD W.
ANDERSON and LLOYD CAMPBELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF

Appeal from the United States District Court
for the District of Montana

J. J. WUERTHNER

JOHN P. WUERTHNER

First National Bank Building
Great Falls, Montana
Attorneys for Appellants

Filed , 1958

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SUBJECT INDEX

	Page
A. Statement of Jurisdiction	1
B. Statement of the Case	2
C. Summation of Testimony	4
1. Witnesses for Plaintiff:	
a. Kuka, Frank	5
b. Spencer, Charles S.	5
2. Witnesses for Defendant:	
a. Aiken, Robert	9
b. Campbell, Lloyd	9
c. Henneman, Henry L.	6
d. Kuka, Frank	8
e. Parlemee, Clarence	8
D. Specifications of Error	10
E. Summary	12
F. Law and Argument	13
G. Statutes cited:	
1. Revised Codes of Montana, 1947	
Sec. 13-704	21
Sec. 13-705	22
Sec. 13-706	22
Sec. 13-720	25
Sec. 17-901	20
Sec. 17-903	20
Sec. 49-108	19
Sec. 49-123	27
Sec. 49-124	27
Sec. 58-207	29
Sec. 58-401	28
Sec. 58-429	28
2. Regulation 25 CFR 171.26	5

H. Table of Cases:

1. Ayers v. Buswell 73 Mont. 518, 238 P. 591	24
2. Brubaker v. D'Orazi 120 Mont. 22, 179 P. 2d 538	26
3. Comerford v. U. S. F. & G. Co. 59 Mont. 243, 259, 196 P. 984	25
4. Cook-Reynolds Co. v. Beyer 107 Mont. 1, 9, 79 P. 2d 658	19
5. Emerson-Brantingham I. Co. v. Raugstad, 65 Mont. 297, 304, 211 P. 305	21
6. Humlbe v. St. John, et al. 72 Mont. 519, 522, 234 P. 475	22
7. Krueger v. Morris 110 Mont. 559, 107 P. 2d 142	19
8. Lehrkind v. McDonnell 51 Mont. 343, 353, 153 P. 1012	22
9. Sutton v. Masterson 86 Mont. 530, 284 P. 264	22
10. Thielbar Realities, Inc. v. National Union Fire Ins. Co. 91 Mont. 525, 9 P. 2d 469	19
11. Union Central Life Ins. Co. v. Jensen 74 Mont. 70, 76, 237 P. 518	21
I. Conclusion	29
J. Appendix	31

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APPELLANTS' BRIEF

A. STATEMENT OF JURISDICTION

The United States District Court for the District of Montana, Great Falls Division, the lower Court herein, had jurisdiction by reason of the fact that the Plaintiff and Appellee herein is the United States of America, the same being alleged by the Plaintiff in the complaint (Tr. p. 3), and also by the provisions of the Rules of Civil Procedure for the District Courts of the United States.

The above-named Circuit Court of Appeals has jurisdiction to review the judgment given herein by reason of the aforesaid Rules of Civil Procedure, and by reason of the fact that the case arose within the State of Montana and which State is within the jurisdiction of the above-entitled Circuit Court of Appeals for the Ninth Circuit.

B. STATEMENT OF THE CASE

The United States Government, as Agent for the Blackfeet Indian Tribe, and Appellee, filed suit against the Defendant, Robert Aiken, and his sureties, L. A. Wollam, Bernard W. Anderson and Lloyd Campbell, by virtue of a lease to the defendant dated January 1st, 1944, which is hereinafter referred to as the "1944 lease," and also on a lease between the parties dated March 14th, 1946, which lease is hereinafter referred to as the "1946 lease," the suit being filed August 27th, 1952.

The complaint in substance demanded payment from the defendant, Robert Aiken, for operation and maintenance charges assessed against the Indian lands covered by the leases, which assessments are referred to herein as "O & M charges" or "irrigation charges."

The plaintiff alleged that the 1944 lease, through mutual mistake and inadvertence, omitted to mention O & M charges, and the plaintiff asked for a reformation of that lease to include such charges.

The 1944 lease by its terms was for a period of five years commencing January 1st, 1944 (Tr. p. 15). The

1946 lease terminated on December 31st, 1950 (Tr. p. 32). The 1944 lease was on a different printed form than the 1946 lease which contained a paragraph that the lessee agreed to pay all operation and maintenance assessments annually in advance (Tr. p. 33). The defendant denied that the lease land was irrigable, and alleged that the same was dry land and that the existing system of canals and ditches serving the irrigation district was inadequate, and it was impossible to irrigate the land in question due to the location and character of such leased lands.

The defendant further alleged that if the irrigation rental was payable in advance of each season, that the Government waived such provision by not insisting on the payment thereof in advance as required by the 1946 lease (Tr. p. 40). In addition, the defendant generally denied any amount was owing to the Government for any water charges.

The case was tried January 18th, 1956, which resulted in the Honorable Charles N. Pray rendering a decision herein which was filed September 4th, 1957 (Tr. p. 52).

It is undisputed in this case that no irrigation was either called for, or used by the defendant on any of the leased lands, and plaintiff did not offer to furnish any such water (Tr. p. 239).

This action was commenced nearly two years after the expiration of the 1946 lease, and four years after the termination of the 1944 lease.

C. SUMMATION OF TESTIMONY

The defendant's un rebutted evidence showed that the land had been farmed prior to, and subsequent to, his leases as dry land. There was a conflict in the testimony whether it was possible to furnish water through the existing systems of canals and irrigation ditches to the lands leased by the defendant, Robert Aiken.

1. Witnesses for Plaintiff

The plaintiff's case consisted of testimony by Irrigation Project Engineers, a ditch rider, and a Superintendent of the Blackfeet Indian Reservation. These witnesses all based their testimony on files, surveys, maps, and records in the irrigation project office, rather than on a personal and physical inspection of the land in question during the time of the defendant's leases to determine actual facts.

The plaintiff's testimony further disclosed that the ditches on the land were constructed about 1916 (Tr. p. 82), and there was no testimony as to the condition of the ditches during the period defendant leased the lands in question. A topographical map of the land was introduced by the Government, and witnesses were allowed to testify as to the irrigability of the land based only on such topographical map rather than a physical inspection of the land (Tr. p. 92).

The Government further urged that its authority for existing irrigation charges was based upon a directive from the Department of the Interior (Tr. p. 118), and a regulation of such department, Regu-

lation 25 C.F.R. 171.26, and published 7 F. R. 3958, reading as follows:

“171.26, Leases or Permits, irrigable lands. Leases and Permits of restricted allotted or tribal Indian lands within an irrigation project shall require the lessee, or permittee, to pay on the due date annually in advance during the term of the instrument, and in amounts determined by orders of the Secretary of the Interior, the operation and maintenance charges, including penalties assessed against the irrigable acreage of the lease or permit, and the irrigation charge shall be in addition to the rental payments prescribed in the lease or permit. All payments of such irrigation charges and penalties shall be made to the Superintendent or other designated officer.”

This directive was not contained in the 1944 lease (Tr. p. 118), as it was in the 1946 lease.

A ditch rider, Frank Kuka, testified briefly that he had observed water in several ditch laterals, but there was no testimony these laterals were in close proximity to the defendant's leased land. His testimony was rather sketchy with reference to when the water was put into ditches, and the condition of the ditches and laterals during the defendant's tenancy. The topographical map, plaintiff's Exhibit No. 2, shows several ditches located in close proximity to the defendant's land, but there was no testimony introduced by the Government to show the condition of the ditches as they existed in 1944, or during the defendant's tenancy.

In support of the Government's attempt to reform the 1944 lease, Charles S. Spencer, the Superintendent

of the Blackfeet Indian Reservation since September 1st, 1954, long after the defendant's leases terminated, admitted that the 1944 lease contained no direct agreement by the defendant to pay O & M charges (Tr. p. 168), when he testified:

“A. That is a '29 form that was used for some reason unknown to me in lieu of the proper form that should have been used at the time and which was used in the other lease.”

At the conclusion of the plaintiff's case the defendant moved to dismiss the First Cause of Action on the grounds that the Government had failed to sustain the burden of proof by a preponderance of the evidence, or any evidence whatsoever, that by mutual mistake and inadvertence of the parties, O & M charges were omitted from the 1944 lease and that the defendant agreed to pay the same (Tr. p. 171).

This motion was denied by the Court, and the defendant assigns this ruling as error.

The defendant further moved to dismiss the Second Cause of Action, which referred to the 1946 lease, on the grounds that the Government had failed to prove the allegations thereof, and this motion was likewise denied by the Court, which ruling the defendant has assigned as error (Tr. p. 171).

2. Witnesses for Defendant

The defendant's first witness, Henry L. Henneman, who farmed for the preceding fifteen years (Tr. p. 174), and succeeded Mr. Aiken in farming the lands

covered by the instant action for seven years, substantially testified as follows:

That he had used no water on the land covering the defendant's leases, and had only paid O & M charges for one year, 1955, during his seven years of leasing (Tr. p. 178); that two types of leases were involved within the project, a purely irrigation lease, and a dry land lease (Tr. p. 183). That the land involved consisted as follows: (Tr. p. 184)

"A. I would say it was quite a light sandy-like soil which is very subject to washing or blowing and therefore it always has been farmed as strip land.

"Q. Why has it been farmed as strip land rather than as irrigated land?

"A. Just because I would say it is not suitable to be irrigated . . .

"Q. And does this strip farming method stop the erosion?

"A. It does."

That the terrain of the land was not suitable for irrigation as a large gully runs through the land (Tr. p. 178, 186).

We direct the Court's attention to Tr. p. 192, where the witness testified to the payment of O & M charges during the year 1951, but this was refunded to him and the charges deleted from the lease.

The witness further testified with reference to defendant's Exhibit No. 11, (Tr. p. 193) which was the subsequent lease on the same land immediately following defendant's leases, and stated that no O & M

charges had been payable under that lease. It is interesting to note that this subsequent lease contained a provision **that no O & M charges would be payable until irrigation was established** (Tr. p. 193, 194). The witness further testified that as of December 1st, 1949, no irrigation service was established on the tracts indicated on plaintiff's Exhibit No. 1, by a circle around the "X" and a square around the "X" (Tr. p. 195). That existing ditches had filled with dirt as a result of blowing (Tr. p. 197), and many ditches were still full of dirt.

The next witness called by defendant was Frank Kuka, who stated he had made a survey of the land for Mr. Henneman and determined that the soil had moved and eroded during the winter which was caused by block farming (Tr. p. 200). In order to prevent erosion, strip farming methods are used and it is not possible to irrigate when that method is used. Erosion to the lands leased by the defendant commenced early in the 1930s and continued during all of the years Mr. Aiken leased the land (Tr. p. 203).

Clarence Parlemee, who previously resided twenty-nine years near Valier, Montana, and ranched one-half mile south of the defendant's lands, also testified to the continued erosion, and, further, that defendant strip-farmed during all of the time he leased the land. He testified that strip farming prevents erosion, while block farming tends to cause erosion, as the soil all blows away (Tr. p. 208).

With reference to the ditches, he stated they would not hold water as they overflowed because of dirt fill. In turn, the water will wash to a lower ditch which settles the silt and blocks lower ditches, and causes the water to flood and seek its lowest level (Tr. p. 211). The witness further testified that as far as he was concerned there was no irrigable land within the Blackfeet Indian Reservation.

Lloyd Campbell, Chairman of the Pondera County Allotment Program of the A.S.C., testified with reference to the type of farming practiced on the leased lands in question. According to the Pondera County ASC records, the land in question was stripped completely (Tr. p. 219), and this was verified by records made from aerial photographs (Tr. p. 221). The defendant's Exhibits Nos. 12 and 13 were introduced, which were made from aerial photographs, and clearly disclosed that only strip farming was practiced on the lands in question.

The defendant, Robert Aiken, testified he originally leased a portion of the lands involved in 1939 as follows: (Tr. p. 234)

“Q. Did you go on the land pursuant to a lease?

“A. No, Mr. Cross, the lease clerk at Browing, at that time I was looking for some land and he came down and told me he would take me up and show me this land and there was a lot of it had blown and big sand piles on it and he said if I would take the strip there, he would give me a lease on it and he said if I wanted water, I could pay for it in advance and get it.”

He further testified he attempted to irrigate the land originally leased but the sod didn't want moisture, and thereafter he stripped it out (Tr. p. 235). The witness further classified the land involved as dry land (Tr. p. 235):

“Because it is too rolling to irrigate and too light to do anything but strip it out and it will not blow away.”

Mr. Aiken further testified that the land could not be irrigated by ditches in the area because they are not large enough and it is only possible to irrigate grain approximately ten days out of a year, and the ditches could not handle sufficient water to irrigate that much acreage (Tr. p. 236). The witness further testified that no demand was ever made for water under the two leases in question.

He further stated that much of the land in question was sod when he first took the leases and he later broke the same and stripped it, which stopped the erosion and blowing, and was in accordance with good farming practices (Tr. p. 251).

D. SPECIFICATIONS OF ERROR

1. That said judgment of the District Court is erroneous in that it adjudges that the Plaintiff, the United States of America have and recover from the Defendants, Robert Aiken, L. A. Wollam, Bernard W. Anderson, and Lloyd Campbell the sum of \$4,385.03 as provided by Conclusions of Law No. 1 filed in said causes, and that the said Plaintiff further recover from the Defendants, Robert Aiken, L. A. Wollam, Bernard W. Anderson and Lloyd Campbell,

the sum of \$553.95 as provided by Conclusions of Law No. 2 on file herein.

2. That the judgment of said District Court is contrary to the applicable law covering said action and the evidence adduced herein, and to the terminology of the leases in question;

3. That the evidence is insufficient to justify reformation of the lease as set forth in Conclusions of Law No. 1 herein, and the same was contrary to the applicable law covering said action;

4. That the evidence is insufficient to justify the judgment based upon Conclusions of Law No. 2 herein;

5. Upon the evidence the District Court was without jurisdiction to reform the lease referred to in Conclusions of Law No. 1 herein;

6. That the judgment of said District Court if enforced would amount to unjust enrichment of the said Plaintiff at the expense of the Defendants;

7. That the Plaintiff waived its rights to claim operation and maintenance charges by a failure to collect the same either in advance or during the terms of the leases in question;

8. That the said judgment is erroneous in that it varies the terms of the written instrument referred to in Findings of Fact No. 1 herein.

For convenience several of the above-named Specifications of Error relate substantially to the same questions. Therefore, the Appellant will argue Specifications of Error Nos. 1 and 3 together; Nos. 3, 5

and 8 together; and Specification No. 7 separately. Specifications of Error Nos. 2, 4 and 6 are related to the other Specifications; and will be generally argued in this brief.

E. SUMMARY

To briefly summarize for the Court the defendant's contentions, they mainly relate to the assessment by the lower Court of O & M charges under the 1944 lease which did not call for the same, and under the 1946 lease where brief mention was made of such charges; but they were neither demanded in advance nor at any time during the terms of the leases. No water was furnished, as good farming practices in the vicinity dictated that the land should be strip farmed as dry land. The character of the soil and the type of terrain did not permit irrigation.

It was doubtful whether irrigation ditches in the vicinity could carry water had it been demanded, and there was a substantial conflict in the testimony as to the location and accessibility of the existing ditches.

The lower Court reformed the 1944 lease to provide for irrigation charges, which resulted in a court-made contract, the terms of which were not agreed upon or contemplated by the parties at the time the lease was entered into.

If the Government is allowed to recover O & M charges it would amount to unjust enrichment for a service which was not contemplated by the parties,

never demanded or furnished during the leases in question. By failing to collect O & M charges in advance, or at any time during the terms of the leases, the Government waived its right to collect such charges, and cannot now attempt to collect the same after the lapse of a number of years.

Also, the Government cannot charge the defendant with its negligence in using an obsolete form and thus collect from the defendant that to which it is not entitled.

Ample authorities will be cited following this summary to back up and fortify every contention made by the defendant.

F. LAW AND ARGUMENT

The defendant's evidence was based entirely on a visual observation of the land in question by those thoroughly familiar with the same with reference to suitability for irrigation. Both prior and subsequent to the leases in question the land had been farmed as dry land. The Government's evidence was based entirely upon maps, the date of which was never fixed, except they were made many years prior to 1944, when the first lease in question was entered into. The Government based its claim on the irrigability of the lands, in addition to the maps, on several witnesses, none of whom were thoroughly familiar with the visible topography of the land; and also on various records in the office of the Superintendent of the Indian Agency, which purported to specify which

lands were irrigable and which were dry land. In addition, the Government attempted to charge the defendant with knowledge of the laws and regulations governing O & M charges which appeared in the 1944 lease, as follows: (Tr. p. 15)

“... in accordance with the provisions of existing laws and the regulations prescribed by the Secretary of the Interior relative to Farming and Grazing leases on restricted Indian lands. . .”

In effect, the Government admitted, by executing the 1944 lease containing the above-quoted language, that the same was in accordance with such rules and regulations, even though O & M charges **were not** inserted therein. To fortify this contention, F. H. McBride, the United States Indian Superintendent, certified that the lease was: (Tr. p. 31)

“... approved and declared to be made in accordance with the law and the rules and regulations prescribed by the Secretary of the Interior thereunder, and now in force.”

The 1946 lease contained practically identical terms except it specified as follows: (Tr. p. 32)

“If this lease covers land within an irrigation project, the lessee is also obligated to pay in addition to the rental the irrigation charges as provided for in Section 6, in accordance with the leasing regulations. (Title 25—Indians, CFR, Part 171, as amended).”

The same terminology appears elsewhere in the 1946 lease (Tr. p. 33).

The Government contended that the defendant was charged with knowledge of these obsolete regulations

in the 1944 lease, which was an outdated form as admitted by the Government, when, in fact, this lease specified it was made in accordance with rules and regulations prescribed by the Secretary of the Interior.

The trial Judge very clearly recognized this omission of the Government when he stated: (Tr. p. 51)

“... it does seem to the Court that a serious oversight or neglect has taken place for which the Government agents were responsible, and which might lead the defendant to believe that no water charges would be made, after so many years had elapsed before a demand for payment, which was due at the beginning of the irrigation season.”

The Court further stated: (Tr. p. 51)

“... the fact that he (the defendant) did not pay these charges in advance as required may have been due to neglect of the officer, whose duty it was to collect such charges when they became due . . . if it should ultimately appear that this Court (Federal District Court) is in error, relief will readily be obtainable.” (parenthesis ours).

The Court was further aware of this negligent oversight of the Government when it stated: (Tr. p. 52)

“... although the Superintendent of the reservation, or someone qualified to act in his behalf, may have been negligent in not collecting these charges when they were due and payable under the contracts.”

It is further interesting to note, with reference to the 1944 lease, under Findings of Fact No. 3, (Tr. p. 53 and 54), that by reforming the 1944 lease defendant agreed to pay all operation and maintenance assessments against the land “annually in advance”.

This finding of fact certainly does violence to the terminology of the 1944 lease as no mention was made therein with reference to O & M charges. This, in effect, reformed that lease to read exactly as the 1946 lease, which explicitly set forth such terminology. This resulted in a judgment requiring the defendant and his sureties to pay all O & M charges with interest to the date of the judgment and interest from the date of the judgment, together with the Government's costs. (Tr. p. 58, 59).

The main point involved the availability of water and suitability of irrigation ditches for irrigation purposes as contended for by the Government and whether the defendant can be charged with knowledge of Department of the Interior regulations with reference to irrigation.

The next contention concerns manifest inconsistencies in the provisions of the leases. In this connection we call the Court's attention to an explicit provision in the 1944 lease, reading as follows: (Tr. p. 19)

"It is understood and agreed by and between the parties hereto that the lessee is to cultivate, improve, and farm the lands covered by this lease in a **husbandlike manner** to the best advantage; that **he is to commit no waste thereon . . .**" (Boldface ours).

The 1946 lease contained similar language, as follows: (Tr. p. 33)

"All farm lands to be farmed in a **husbandlike manner** on a crop rotation basis, with at least one leguminous crop on all five-year leases." (Boldface ours).

Regardless of the type of land involved, the following inconsistent provision was also inserted in the 1946 lease: (Tr. p. 33)

“All land farmed as irrigated farm land on a crop rotation basis.”

It is undisputed in this case that the land could not be farmed as irrigated land as the land consisted of light, sandy soil, subject to washing or blowing and which would cause erosion (Tr. p. 184, 195, 200, 208, 219, 235, 251).

In spite of this overwhelming testimony, the Government contended the defendant was compelled to irrigate the land and pay irrigation charges.

If the defendant irrigated the land as specifically required by the 1946 lease, he would be in default under the terms of the leases as he would not be farming the same in a husbandlike manner. The defendant, therefore, was penalized by the lower court for strip farming and preventing erosion, which was good farming practice in the vicinity, and did not irrigate the land as required by the leases. We, therefore, have a strange paradox presented by the very terms of the leases. **On one hand, husbandlike practices in the vicinity dictated that dry land should be strip farmed in order to comply with the leases, while the leases dictated that the land should be irrigated. On the other hand, if the defendant irrigated the land, the same would involve block farming and cause erosion, which would be a violation of the lease covenants to farm the land in a husbandlike manner.**

The lower Court, in effect, sustained the contention that the land should have been irrigated, or was susceptible to irrigation, and penalized the defendant for attempting to stop erosion by strip farming. This position is grossly inconsistent with sound business and farming practices.

Next we call the Court's attention to the provisions of the 1944 lease with reference to delinquencies: (Tr. p. 26)

“ . . . if the lessee hereto shall fail to pay the rents when due . . . the lessor, or the officer in charge of the Indian reservation, may declare the lease forfeited by giving notice as required by law, and may thereupon re-enter and take possession of the leased premises . . . ”

The 1946 lease contains no such forfeiture clause. There is no evidence in this case that the Government attempted to collect any irrigation charges whatsoever in advance under either lease, and defendant contends that such constituted a waiver of such O & M charges. As previously stated, the trial Judge indicated there might be such a waiver (Tr. p. 51). The plaintiff relies on Regulation 25 CFR 171.26, (*supra*) which requires payment of irrigation charges in advance. By the terminology of the leases, and no demand being made on the defendant for irrigation charges when the defendant paid his annual rentals under the leases, the Government is estopped to assert the regulation quoted.

Montana adheres to the rule that acquiescence in a contract, after learning that it does not represent

the actual agreement, destroys the right of reformation. **Krueger v. Morris**, 110 Mont. 559, 107 P 2d 142. The evidence in this case is overwhelming that the Government acquiesced for nearly eight years in the non-payment of irrigation charges by defendant in not collecting the same in advance as was required by the 1946 lease.

If such provision is to be implied in the 1944 lease, the same premise is also true. In this connection we cite Sec. 49-108, RCM 1947, which states:

“Acquiescence in error takes away the right of objecting to it.”

The case of **Cook-Reynolds Co. v. Beyer**, 107 Mont. 1, 9, 79 P 2d 658 held as follows: A party seeking reformation of a contract on the ground of mistake in execution, after becoming aware of the mistake or the circumstances are such that he will be presumed to have known of it, acquiesces in the instrument:

“... he loses his right to reformation . . . acquiescence . . . may be implied from an unreasonable delay in applying for redress after getting notice of the mistake . . .”.

A mutual mistake for which a written instrument may be reformed must be reciprocal and common to both parties each alike laboring under the same misconception. **Thielbar Realities, Inc. v. National Union Fire Ins. Co.**, 91 Mont. 525, 9 P 2d 469.

We call the Court's attention to the fact that the 1944 lease form was made up in April, 1929, while the 1946 lease used the revised form of August 1943.

The Government's negligence thus penalized the defendant for its use of an obsolete form and attempts, in the present action, to revise the April 1929 lease form to read the same as the August 1943 form. This should not be contended by the Court.

An elementary principle with reference to reformation of an agreement is contained in Sec. 17-901, RCM 1947, under which provisions the plaintiff proceeded (Tr. p. 6). Those provisions read as follows:

“When, through fraud or a mutual mistake of the parties, or a mistake of one party, while the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.”

The Government alleged mutual mistake of the parties. Nowhere does the transcript disclose any such mutual mistake or even a mistake of one party which the other party at the time knew or suspected.

Sec. 17-903, RCM 1947, states the principle of revision as follows:

“In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.”

It is apparent from examination of the testimony in the instant case that the 1944 lease did not intend to bind the defendant for O & M charges, since these were not collected prior thereto, nor in subsequent

leases. This is also fortified by the uncontroverted testimony that the land was not susceptible to, or of, irrigation.

With reference to the 1946 lease, the plaintiff did not intend to assess O & M charges, or the same would have been collected in advance as required by the terms thereof. By reforming the 1944 lease, there was substituted a court made contract rather than one by the parties. In support of this we cite **Union Central Life Ins. Co. v. Jensen**, 74 Mont. 70, 76, 237 P. 518, where it was held:

“Courts must give effect to every part of a contract so as to make its terms operative; they may not make a new contract for the parties, **nor read language into** or eliminate lawful terms therefrom unless the words employed are meaningless or involve an absurdity . . .” (Boldface supplied).

In further support of this rule, we cite **Emerson-Brantingham I. Co. v. Raugstad**, 65 Mont. 297, 304, 211 P. 305:

“It is the province of the court to interpret contracts which are open to interpretation, not to make new ones for the parties, or to alter or amend those which they, themselves, have made.”

The laws of Montana with reference to interpretation of contracts are clearly set forth in Sec. 13-704, RCM 1947, as follows:

“The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”

The following section (Sec. 13-705, RCM 1947) clarifies the interpretation of written contracts:

“When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this chapter.”

If the decision of the lower Court is allowed to stand, it, in effect, varies the terms of a written instrument by parole evidence, which is not permissible in Montana unless the terms or expressions in the leases involved are of doubtful import and are uncertain and ambiguous. **Sutton v. Masterson**, 86 Mont. 530, 284 P. 264; **Lehrkind v. McDonnell**, 51 Mont. 343, 353, 153 P. 1012.

Sec. 13-706, RCM 1947, allows a writing to be reformed when through fraud, mistake or accident a written contract fails to express the real intention of the parties, and such intention is to be regarded and the erroneous parts disregarded. A Montana case decided under this section of the Code is **Humble v. St. John, et al.**, 72 Mont. 519, 522, 234 P. 475. That case held as follows:

“Before equity will intervene to correct a mutual mistake in a written instrument, the evidence of the mistake must be clear, convincing and satisfactory.”

In the instant case any mistake made was of a unilateral character and was made entirely by the Government herein and would, therefore, lack the mutuality required by the laws of Montana for reformation.

The Government was allowed to introduce evidence of preliminary negotiations leading up to the execution of the leases in question which consisted of an advertisement for bids for sale of farming and grazing leases (Tr. p. 10 to 14). That advertisement recognized strip farming methods in a dry land area and is consistent with the defendant's contention that good husbandry and farming practices required strip farming, when it stated: (Tr. p. 10)

“Land in the dry land area must be farmed by the strip method and any new land broken must be stripped the third year and thereafter.”

The advertisement further prohibited dry land farming in the irrigable area.

There was considerable conflict in the testimony with reference to whether the land leased to the defendant was located in the irrigable area, the Government basing its contention on obsolete maps and records and the defendant basing his contention on the actual experience of farmers residing in the locality with extensive farming experience. There was nothing in the notice of bids which would in any manner advise the defendant he was required to irrigate his leased land or to pay O & M charges. The advertisement for bids was flimsy evidence to charge the defendant with O & M assessments. This certainly did not constitute a preponderance of the evidence in this instance.

There was a unilateral mistake in the instant case, namely a Government clerk, using an absolute form

of lease, and the defendant cannot be charged with this mistake. The record is entirely devoid of any knowledge by the defendant of the use of such obsolete form, or that the Government intended to collect O & M charges under the leases.

Ayers v. Buswell, 73 Mont. 518, 238 P. 591, is predicated on the grounds of excusable negligence and in part is as follows:

“... the mere fact that a party seeking a reformation of an instrument on the ground of mistake may himself have been negligent is not a ground for refusing relief; but if the negligence is **excusable** as where plaintiff is an old man and not accustomed to transact business, and defendant is a much younger man of extensive business experience, relief will be granted when, in view of all the circumstances, to deny it would permit plaintiff to suffer a gross wrong at the hands of “defendant.”
(Boldface ours)

The Blackfeet Indian Tribe, as an instrumentality of the Federal Department of the Interior and the the United States Government, may claim excusable neglect by using an obsolete form. However, the defendant was not versed in the procedure of leasing Indian lands, nor did he participate in the actual drafting of the instrument involved, and not possessing extensive legal and business experience or having knowledge of the regulation in question, (Reg. 25 CFR 171.26) should not be penalized for a mistake of the Government.

Another pertinent Montana statute relates to cases of an uncertainty in a written agreement. That statute

is Section 13-720, RCM 1947, which is as follows:

“In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.”

It is readily apparent that any uncertainty, especially regarding the 1944 lease, was caused by the plaintiff in not including O & M charges in the lease. Interpreting the agreement most strongly against the Government, who caused the uncertainty to exist, the defendant should not be made to pay such charges as he was entirely innocent in the whole affair, and entered into the lease knowing full well such land was to be farmed by the strip method, and that it would be both unwise and impractical to irrigate the same. As has been previously stated, it would also amount to a breach of the covenant in the leases to farm the land according to good husbandry.

If the decision of the lower Court is allowed to stand, the defendant will suffer a gross wrong in having to pay for irrigation charges which were not collected in advance or at any time during the leases, for water which was not needed, never called for, or used, and it could not be delivered had he called for, or desired, the same.

It is well settled in Montana that reformation does not lie for a unilateral mistake which the other party, the defendant herein, had no knowledge of and did not suspect the particular clause in question was inadvertently omitted. We cite **Comerford v. U. S. F. & G. Co.**, 59 Mont. 243, 259, 196 P. 984.

The Government drafted the agreement on its own form, and the defendant, not being experienced in leases of this nature, as was the plaintiff, nor being represented by counsel, nor experienced in legal technicalities, executed the same.

The law requires clear and convincing proof that the failure of the agreement to express the true intent of the parties was the result of fraud, mutual mistake, or a mistake of one party, which the other at the time knew or suspected. **Brubaker v. D'Orazi**, 120 Mont. 22, 179 P. 2d 538.

The purpose and equity of reformation is not to make a new agreement, but to establish and perpetuate the true one, and courts cannot insert a provision intentionally, or inadvertently omitted therefrom, which the defendant had no knowledge of until long after his last Indian lease expired, or for a service which was neither rendered or offered to be rendered.

In further construing Sec. 17-903, RCM 1947 (supra), a normal inquiry would relate to the customary farming practices on the leased land in question, prior to, and subsequent to, the leases in question. The undisputed testimony in this case disclosed that the land was best adaptable to dry land farming, or strip farming, which was engaged in extensively in that area. Had the lower Court considered the intent of the instrument and its legal consequences, and the defendant's testimony as to farming practices, a different result would have been reached. The undisputed testimony showed the character of

the soil to be of a light sandy nature, which was not adaptable to irrigation. The contour of the land is also important, and the testimony disclosed there was a large gully running through the land that was uneven in character, which does not permit irrigation. There was considerable testimony with reference to land erosion prior to the defendant's leases and, hence, strip farming was practiced to prevent such erosion and preserve the land value for raising crops.

If irrigation was practiced on the land, the testimony showed it could not be stripfarmed, and further erosion would result, causing considerable damage to the land, and, most important, would not be consonant with good farming practices.

It is an elementary axiom of the law that it does not require the performance of useless or idle acts, nor does it require impossibilities. Sec. 49-123, 49-124, RCM, 1947.

The contention was made by the Government in the lower Court that the defendant Aiken was under an implied obligation to irrigate on a dry land farm in spite of the overwhelming testimony that water could not be used on the land in question. It cannot be implied from the contract of the parties that dry land farming was forbidden when the plaintiff failed to collect the irrigation assessment in advance as required by the 1946 lease, and that approximately eight years had elapsed before any attempt to collect such charges was made. The mere fact that the irrigation project had canals, the condition of which was

of doubtful character, is no evidence of any duty to irrigate the land when the plaintiff well knew that the defendant farmed it as a dry land unit during all of the years of the leases in question.

The Government further contended that the defendant was charged with knowledge of the rules and regulations which required users of water on the irrigation project to pay the O & M assessment annually in advance. This contention failed when the leases themselves solemnly declared they were made **in accordance** with the law and the rules and regulations prescribed by the Secretary of the Interior.

In accepting annual rentals from the defendant under the leases, the plaintiff accepted them in full performance of the leases by not insisting on the payment of O & M charges at the same time. This is fortified by the provisions of Sec. 58-401, RCM 1947:

“Full performance of an obligation by the party whose duty it is to perform it . . . **if accepted by the creditor** extinguishes it . . .” (Boldface ours)

The conduct of the Government in not insisting upon the payment of O & M assessments, either in advance or at any time during the leases in question, is fully covered by the provisions of Sec. 58-429, RCM 1947:

“The want of performance of an obligation, or of an offer of a performance, in whole or in part, or any delay therein, is excused by the following causes to the extent to which they operate:

“. . . 3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the

time at which such performance or offer may be made, and not rescinded before that time.”

If there was an obligation on the defendant to pay O & M charges at the time the annual rentals were due under the leases, this obligation would constitute a condition concurrent as set forth in Sec. 58-207, RCM 1947:

“Conditions concurrent are those which are mutually dependent, and are to be performed at the same time.”

Here, concurrent conditions consisted of the payment of the rentals under the leases, and at the same time, the payment of O & M charges in advance of the farming year. By not demanding O & M charges in advance, the Government breached the necessary concurrent conditions to entitle it to recover, and thereby waived its rights to collect such assessments long after the leases had terminated.

I. CONCLUSION

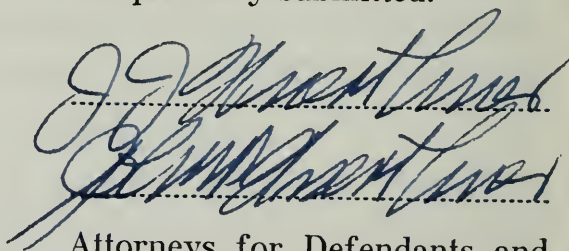
It should be readily apparent to the Court from the citation of numerous authorities and statutes, there is no legal basis for the Government to either assess or enforce the collection of O & M charges, together with interest thereon, and the lower Court was in error in this regard.

There was no evidence to justify reformation of the 1944 lease; neither do the applicable Montana Statutes permit reformation by the flimsy testimony of the plaintiff in support of reformation.

While the 1946 lease contained an indirect reference to O & M charges, the Government, by acquiescing in the non-payment of the same for many years during the leases, and subsequent thereto, waived its right to collect such charges. The authorities cited in this brief in support of this contention amply fortify appellant's position.

In conclusion, the appellant urges that the decision of the lower Court be reversed and judgment be entered for appellants. This is not only consonant with equity and the principles of law involved, but is in accordance with the overwhelming weight of the testimony which, in appellant's opinion, greatly preponderates in his favor.

Respectfully submitted.

Two handwritten signatures in dark ink, written over two horizontal dotted lines. The signatures are cursive and appear to be of the same person or closely related individuals.

Attorneys for Defendants and
Appellants

APPENDIX TO APPELLANTS' BRIEF

Exhibits identified, offered, received, rejected or withdrawn as Evidence.

(Page numbers refer to transcript)

Ex. No.	Identified	Offered	Rejected	Received	With- drawn
Plf. 1	68, 91	69, 92		97	73
Plf. 2	74, 85	87		87	77
Plf. 3	85	87		87	
Plf. 4	79, 85	87		87	
Def. 5	122				
Def. 6	240	240		241	
Plf. 7	134	137		143	
Plf. 8	144, 160	160		160	
Plf. 9	161	162		163	
Plf. 10	169	169		170	
Def. 11	178	179, 184		188	
Def. 12	220, 225, 227	222, 224, 228		229	
Def. 13	221, 225	222, 224, 228		229	
Plf. 14	246	247			
Plf. 15	246	247			

No. 15835

United States
Court of Appeals
for the Ninth Circuit

RICHARD DOUGLAS FURNISH,
Appellant,
vs.

THE BOARD OF MEDICAL EXAMINERS OF
THE STATE OF CALIFORNIA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California, Central Division

FILED

JAN 22 1958

PAUL P. BRENN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Certificate of Clerk to Transcript of Record on	24
Notice of	23
Order Restoring and Granting Injunction During Pendency of.....	20
Statement of Points on (USCA).....	47
Certificate of Clerk to Transcript of Record...	24
Complaint	3
Judgment of Dismissal for Lack of Jurisdiction Over the Subject Matter.....	22
Motion to Dismiss for Failure to State a Cause Entitling Petitioner to Relief, etc.....	19
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	23
Order Restoring and Granting Injunction During Pendency of Appeal.....	20
Order to Show Cause and Temporary Restraining Order	17
Statement of Points on Which Appellant Intends to Rely (USCA).....	47
Transcript of Proceedings of Dec. 6, 1957.....	25



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* Page numbers appearing at bottom of page of Original Transcript of Record.

In The United States District Court, Southern
District of California, Central Division

No. 1305-57T

RICHARD DOUGLAS FURNISH, M.D.,
Plaintiff,

vs.

THE BOARD OF MEDICAL EXAMINERS OF
THE STATE OF CALIFORNIA, JOHN
DOE I to V, inclusive, Defendants.

COMPLAINT

(Declaratory Relief—Injunction)

Comes now the plaintiff, Richard Douglas Furnish, M.D., and for cause of action against the defendants above named complains and alleges as follows:

I.

That the plaintiff is a resident and citizen of the State of California, County of Los Angeles, and the above District, and has been such for the last twenty years. That your petitioner has continuously for the past twenty years been a practicing physician and surgeon, duly licensed to practice in the State of California, and so licensed by the Board of Medical Examiners of the State of California, and that for the last twenty years he has maintained an office in Los Angeles County, California, and has built and established a substantial business as a physician and surgeon. That on or about the 10th day of November, 1955, the said

Board of Medical Examiners made an order directing that the [2] plaintiff be suspended for a period of one year from the practice of medicine and surgery in the State of California, which order is effective, unless stayed by an order of this Court.

That said order of suspension for one year made by said Board of Medical Examiners was made after a hearing before the Board's Hearing Officer, Philip C. Farman, in which the said Hearing Officer proposed that your complainant be suspended from the practice of medicine and surgery for one year, and that the execution of this order of suspension be stayed and that your petitioner be placed upon probation for a period of three years, upon terms and conditions substantially requiring that he obey all laws of the United States and of the State of California, its political subdivisions, and all rules and regulations governing the practice of medicine and surgery in the State of California.

Notwithstanding such recommendation by said Hearing Officer, the said Board of Medical Examiners made the order of suspension for a period of one year hereinabove described.

II.

That the order heretofore referred to, made by the said Board of Medical Examiners suspending the plaintiff from the practice of medicine and surgery in California for a period of one year, was made after a proceeding in the United States District Court for the Southern District of California,

Central Division, entitled "United States of America vs. Richard Douglas Furnish" (charged as Richard D. Furnish), bearing that Court's No. 22,754 Criminal. That the plaintiff entered pleas of nolo contendere to two counts of felonies, being violations of Title 26 U. S. Section 145(b), charging that he did wilfully and knowingly attempt to defeat and evade a large part of the income tax owing by him to the United States of America for the calendar years 1947 and 1948, and each of said years. Plaintiff alleges that under the federal rules the stigma which follows and attaches to conviction of a felony is not considered to attach and follow a plea under a nolo contendere plea. That the Honorable Leon R. Yankwich, United States District Judge Presiding in the [3] matter pronounced the judgments upon which this disciplinary action is based. At the time of pronouncement of judgment, the Court had this to say:

"The Court: This case is different from the usual one involving a physician. Many a time a physician involved in income tax difficulties is one who resorts to unethical practices, and who then tries to cover them up by covering up his income tax. In this particular case there is no such thing. There is no income indicated from any improper sources. This is really the case of a person who has become involved because of his lack of experience in financial matters and his failure to surround himself with persons who, while he is carrying on his work, would watch his finances and see that proper report is made. This is a very volumi-

nous file here which has been built up by the many letters sent in, which I have in front of me. Some are of a confidential nature and I will not have them filed, but will return them to the probation officer.

“I think the man’s past life is not such that probation would be necessary. I think a substantial fine will serve the ends of justice in this particular case, and allow this man to go on. I think, on a plea of *nolo contendere* they do not consider—at least, the Medical Board does not consider that as a ground for revoking his license, and unless they have professional grounds, certainly his license should not be revoked for this particular offense. I am sure it would be revoked if I imposed any sentence other than a fine, although, technically speaking, a plea of *nolo contendere* does not carry with it any of the civil penalties.

“Is there any legal cause why judgment should not [4] now be pronounced?

“Mr. Carr: None, your Honor.

“The Court: It is the judgment of the court for the offense for which you stand convicted—is it count 1?

“The Clerk: Count 2, your Honor.

“Mr. Kennison: To counts 2 and 3 he entered the plea.

“The Court: To counts 2 and 3, and not guilty to count 1.

“It is the judgment of the court that on count 2 you be fined the sum of \$5,000, and on count 3 the sum of \$5,000.

“Mr. Kennison: I move to dismiss count 1, your Honor.

“The Court: Count 1 will be dismissed, and time will be allowed, if time is desired.”

That there was a finding by the trial court that “technically speaking, a plea of nolo contendere does not carrying with it any of the civil penalties.” That the trial court, after a full consideration of all of the matters and with full knowledge of the law insofar as the effect of a nolo contendere plea was concerned, was attempting to pronounce such a judgment as would preclude the penalty which has been assessed by the Board of Medical Examiners against the plaintiff.

III.

That the plaintiff contends that mere proof of a nolo contendere plea to a charge of tax evasion is insufficient to warrant the action of the Board in suspending the plaintiff from the practice of medicine, where there is no affirmative proof of moral turpitude, and in this case Judge Yankwich, the trial Judge in the Federal Court, in effect held that there was no moral turpitude; and, in effect, this matter became Res Adjudicata.

IV.

That Section 2383 of the Business and Professions Code, as [5] amended by the Statutes of 1951, Chapter 792, paragraph 1, provides as follows:

“Sec. 2383. Conviction of felony or offense involving moral turpitude; record as evidence: What deemed conviction: Authority of Board after order under Pen. C. Sec. 1203.4. The conviction of a felony, or of an offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The Board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code, allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty or dismissing the accusation, information or indictment.”

That said Section 2383 of the Business and Professions Code, as hereinbefore alleged, was enacted in 1951; that the offenses to which your complainant entered a *nolo contendere* plea occurred in the years 1947 and 1948.

That at the time these offenses were alleged to have been committed, namely, income tax evasion for the years 1947 and 1948, Section 2383 of the

Business and Professions Code provided as follows:

“Sec. 2383. Conviction of felony or offense involving moral turpitude: Evidence. The conviction of a felony [6] or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct.”

That the substantial changes in Section 2383, as enacted in 1951, insofar as they relate to your petitioner, are: That after the words, “the conviction of a felony” a comma was inserted, so that the statute, as amended in 1951, read:

“The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter * * *”

And there was added:

“A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section * * *”

There are therefore two changes in the Section as enacted in 1951: First: That a comma was inserted after the word “felony”; second, an addition was made to the Section to the effect that a plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this Sec-

tion. That no comma was inserted after "felony" in the second portion.

That plaintiff alleges that the Board of Medical Examiners has applied to the plaintiff the law as enacted in 1951, rather than the law as it was in 1947 and 1948. The law itself, as enacted in 1951 and its application in this case to events occurring in 1947 and 1948, amounts to the passage of and application of an "ex post facto law," and thus the law itself and its application is unconstitutional and in violation of Article I, Section 10 of the Constitution of the [7] United States which provides, among other things, that no State shall "pass any bill of attainder or ex post facto law." The application of such an ex post facto law amounts to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Section 2383 of the Business and Professions Code, as enacted in 1951 and as described hereinbefore, sets up a ground for disciplinary action which was not a ground for disciplinary action in 1947 and 1948, which is the time the occurrences took place upon which this order of suspension is based.

The action of the Board in thus applying to plaintiff the statute as enacted in 1951 for acts committed in 1947 and 1948 is unconstitutional, as just hereinbefore set forth.

That at the time of the occurrences of the offenses to which your complainant entered the plea of nolo contendere, Section 2383 provided as hereinabove set forth,

“the conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct * * *”

This meant that the felony must have been of such a nature as to involve moral turpitude. As the law now reads, as amended in 1951, it appears to mean any felony, whether it involves moral turpitude or not; although no comma exists after the word “felony” in the portion dealing with a *nolo contendere* plea.

V.

That plaintiff, as such physician and surgeon, has built up a substantial business within the County of Los Angeles, and his right to practice as a physician and surgeon is a vested property right of substantial value, and great and irreparable injury will result to plaintiff if the order of the Board of Medical Examiners of the State of California, directing that the plaintiff be suspended from practice for one year, be enforced and allowed to stand. [8]

VI.

That plaintiff alleges that the action of the Board of Medical Examiners of the State of California, as hereinabove set forth, amounts to a denial of the plaintiff's civil rights, in that a plea of “*nolo contendere*” in the federal court does not carry with it the suspension of such person's civil rights and, in this case, the proceeding by the defendant Medical Board to suspend the plaintiff from practice of medicine within the State of California for a period of a year amounts to a violation of his civil rights

and is in violation of the Fourteenth Amendment to the Constitution of the United States and a violation of "due process" of law.

That the act of the defendant Medical Board in suspending the plaintiff from the practice of medicine for a period of a year is an intrusion by said Medical Board into the processes of the federal court in this particular instance, and is an effort by the same defendant Medical Board to attach a penalty which is not prescribed by law.

That the plaintiff, as hereinbefore set forth, has practiced medicine within the City and County of Los Angeles, California, for more than twenty years last past, and at the present time has approximately 400 patients dependent upon the plaintiff for care and treatment, many of whom are seriously ill, and many of whom are without funds, being treated by this plaintiff without charge; that plaintiff's practice is a substantial one and, if he is required to cease the practice of medicine at this time, he will suffer great damage; that he has no speedy or adequate remedy except by recourse to this Court for an injunction to restrain the defendant Board of Medical Examiners of the State of California from suspending this plaintiff from the practice of medicine within the State of California.

VII.

That the District Court of Appeal of the State of California [9] in and for the Second Appellate District affirmed the judgment of the Superior

Court of the State of California in and for the County of Los Angeles, dismissing petitioner's petition for writ of mandate to set aside the decision of the Board of Medical Examiners.

A petition for rehearing in the District Court of Appeal was denied on April 9, 1957.

An application to the District Court of Appeal to grant a rehearing on its own motion was denied April 19, 1957.

The petition for hearing in the California Supreme Court was denied on May 15, 1957.

The petition for Writ of Certiorari was duly filed in the Supreme Court of the United States and was denied on October 14, 1957.

The Petition for Rehearing of the petition for Writ of Certiorari was denied by the Supreme Court on November 18, 1957, notice of said ruling being received by plaintiff on November 21, 1957; that the stay granted by the Supreme Court expired at that time.

VIII.

That an actual bona fide dispute exists between the plaintiff and the defendants herein; that the defendants contend that they have a right under the law to suspend the plaintiff from the practice of medicine; they contend that civil penalties do attach to a nolo contendere plea in the United States Court; they contend that the act under which they seek to suspend the plaintiff doctor is no ex post facto law; they contend that their acts and conduct in suspending the plaintiff doctor are con-

stitutional and in all respects regular and in accordance with the law.

The plaintiff contends that the defendants seek to take from him his civil rights to practice medicine by reason of his *nolo contendere* plea; that the defendants seek to hold that a *nolo contendere* plea carries with it the loss of civil rights, and, particularly, the right to practice medicine—the plaintiff contends that the defendants seem to apply to him an *ex post facto* law in [10] violation of Article I, Section 10 of the United States Constitution which provides, in substance, “that no state shall pass any bill of attainder or *ex post facto* law”. The application of such an *ex post facto* law amounts to denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The defendants seek to apply against the plaintiff a law which was not in effect at the time the alleged acts were committed from which arose the plea of *nolo contendere*.

The plaintiff contends that the defendants have invaded the processes of the federal court in that they have sought to intrude a judgment passed on the *nolo contendere* plea to include civil sanction which cannot be attributed to such a plea in the federal court.

The plaintiff contends that the entire proceeding before the Board of Medical Examiners of the State of California was arbitrary, capricious, unreasonable and in violation of the law.

IX.

That this is a bona fide dispute and will require a decree and judgment of the court to declare and determine the rights of the parties—to determine whether the laws, the regulations and their enforcement are unconstitutional, and to declare and determine the rights of the respective parties, namely, the defendants, the Board of Medical Examiners of the State of California, and plaintiff doctor.

X.

That there is no plain, speedy and adequate remedy in the ordinary course of law by which the plaintiff might obtain justice, and therefore he seeks this declaration of rights and injunction.

XI.

That the defendants, John Doe I to V inclusive, are named herein under their fictitious names for the reason that plaintiff does not know the true names of such defendants, but plaintiff is [11] informed and believes, and upon such information and belief alleges that such defendants were at all times herein mentioned and are the agents of defendant, Board of Medical Examiners of the State of California, and when plaintiff has ascertained the true names of such defendants, he will ask leave of this Court to amend this complaint to include their true and correct names.

Wherefore, plaintiff respectfully prays as follows, to-wit:

1. That his rights in the premises be declared, and that the order of the Board of Medical Examiners of the State of California, suspending the plaintiff from the practice of medicine in the State of California for one year, be declared null and void;

2. That an order to show cause be issued out of this Court directed to the defendants, requiring them to appear and show cause before this Court why they should not be restrained from enforcing their order of suspension of plaintiff from the practice of medicine in the State of California; that a time be fixed by this Court for the hearing of said order to show cause, and that upon such a hearing, said order be made permanent pending a trial of this matter upon the merits; that a permanent injunction be issued against the defendants, restraining them from carrying into effect the order of suspension of said plaintiff from the practice of medicine in the State of California, and that upon the hearing of this order upon the merits that the same be made permanent.

3. That in the alternative a writ of mandate be issued out of this Court, commanding the said Board of Medical Examiners of the State of California to cease and desist from enforcing the order of suspension hereinabove described, and from interfering with the said plaintiff in the practice of his profession as a physician and surgeon in the State of California.

4. For such other and further relief as to the

Court may seem meet, just and equitable in the premises.

MURRAY M. CHOTINER and
RUSSELL E. PARSONS,

/s/ By MURRAY M. CHOTINER,
Attorneys for Plaintiff, Richard
Douglas Furnish, M.D. [12]

Duly Verified. [13]

[Endorsed]: Filed November 25, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon reading the verified complaint in this action and the affidavit of Richard Douglas Furnish, M.D., and it appearing to the satisfaction of the court therefrom that this is a proper case for granting a temporary restraining order, and that unless the temporary restraining order prayed for in said complaint be granted, great injury will result to the plaintiff before the matter can be heard on notice,

Now, Therefore, It Is Hereby Ordered that the defendant, the Board of Medical Examiners of the State of California, be and appear before this Court in the court room of Ernest A. Tolin, located on the second floor of the Los Angeles Post Office and Court House Building at Temple and Broadway Streets, Los Angeles, California, at the hour of 2:00 o'clock p.m. on the 6th day of December, 1957, then and [14] there to show cause, if any it has,

why it and its agents, servants, officers and employees should not be enjoined and restrained during the pendency of this action from enforcing the order made by the Board of Medical Examiners of the State of California on the 10th day of November, 1955, suspending the said Richard Douglas Furnish, M.D., the plaintiff herein, from practicing medicine and surgery within the State of California.

It Is Further Ordered that pending the hearing of this Order to Show Cause that the defendants and its servants, agents, officers and employees be and they are hereby enjoined and restrained from enforcing that order made by the Board of Medical Examiners of the State of California on the 10th day of November, 1955, suspending the said Richard Douglas Furnish, M.D., from practicing medicine and surgery within the State of California.

It Is Further Ordered that a copy of the original petition herein and affidavit of Richard Douglas Furnish, M.D., and Points and Authorities be served on the defendant not later than the 26th day of November, 1957.

Dated: This 25th day of November, 1957, at 12:15 p.m.

/s/ ERNEST A. TOLIN,

United States District Judge. [15]

[Endorsed]: Filed November 25, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS FOR FAILURE OF
PETITIONER TO STATE A CAUSE EN-
TITLING HIM TO RELIEF AND FOR
LACK OF JURISDICTION OVER THE
SUBJECT MATTER

Comes Now the defendant, the Board of Medical Examiners of the State of California, and makes this motion to dismiss the complaint (Declaratory Relief—Injunction) upon the following grounds, to-wit:

I.

That the complaint in declaratory relief—injunction does not, nor does any part thereof, state a claim on which relief can be granted, nor does the same nor any portion thereof state facts sufficient to entitle the petitioner to the relief sought or to any relief.

II.

That the court lacks jurisdiction over the subject matter of the complaint in declaratory relief—injunction. [16]

Wherefore, defendant, the Board of Medical Examiners of the State of California, prays that plaintiff and petitioner take nothing by this proceeding; that the said proceeding be dismissed and that the temporary restraining order be dissolved and the injunction sought be denied; that the defendant have judgment against said petitioner en-

tered for costs incurred herein; and for such other and further relief as the court shall deem proper.

Dated: This 4th day of December, 1957.

EDMUND G. BROWN,
Attorney General,

/s/ JAMES L. MAMAKOS,
Deputy Attorney General,

Attorneys for Defendant, the Board of Medical
Examiners of the State of California. [17]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 4, 1957.

[Title of District Court and Cause.]

ORDER RESTORING AND GRANTING IN-
JUNCTION DURING PENDENCY OF AP-
PEAL

On motion duly made by Richard Douglas Furnish, M.D., plaintiff and appellant, and it appearing to the satisfaction of the Court that this is a proper case for restoring and granting an injunction during the pendency of an appeal by plaintiff and appellant from the Order Dissolving Temporary Restraining Order and the Judgment of Dismissal for Lack of Jurisdiction Over the Subject Matter, and that, unless there is a restoration and granting of an injunction pending the appeal, great injury will result to the plaintiff before the matter can be determined on appeal,

Now, Therefore, It Is Hereby Ordered:

That pending the appeal taken by plaintiff and appellant, that the defendant and respondent the Board of Medical Examiners of the State of California, its agents, servants, officers and [54] employees be, and they are hereby enjoined and restrained from enforcing that Order made by the Board of Medical Examiners of the State of California on November 10, 1955, suspending the said Richard Douglas Furnish, M.D., from practicing medicine and surgery within the State of California.

Bond is hereby fixed in the sum of \$250.00.

Dated: December 16, 1957.

/s/ ERNEST A. TOLIN,

United States District Judge. [55]

[Endorsed]: Filed December 16, 1957.

In the United States District Court for the Southern District of California, Central Division

No. 1305-57-T

RICHARD DOUGLAS FURNISH, M.D.,
Plaintiff,

vs.

THE BOARD OF MEDICAL EXAMINERS OF
THE STATE OF CALIFORNIA, JOHN
DOE ONE TO FIVE, INCLUSIVE,
Defendants.

JUDGMENT OF DISMISSAL FOR LACK OF
JURISDICTION OVER THE SUBJECT
MATTER

The above entitled matter having been set for hearing on an Order to Show Cause on December 6, 1957, Murray M. Chotiner and Russell E. Parsons appearing on behalf of plaintiff, Richard Douglas Furnish, M.D.; defendant, the Board of Medical Examiners of the State of California, appearing by Edmund G. Brown, Attorney General, by James L. Mamakos, Deputy Attorney General, and after hearing it is

Ordered that defendant's motion to dismiss for lack of jurisdiction be sustained; that the complaint be dismissed and that plaintiff take nothing by his suit.

Ordered, Adjudged and Decreed this 16th day of December, 1957.

/s/ ERNEST A. TOLIN,
United States District Judge. [56]

[Endorsed]: Lodged December 10, 1957. Filed and Entered December 16, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Richard Douglas Furnish, M.D., plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Dissolving Temporary Restraining Order and Judgment of Dismissal for Lack of Jurisdiction Over the Subject Matter, entered in this action on December 16, 1957.

MURRAY M. CHOTINER and
RUSSELL E. PARSONS,
/s/ By MURRAY M. CHOTINER,
Attorneys for Appellant, Richard
Douglas Furnish, M.D. [57]

Affidavit of Service by Mail Attached. [58]

[Endorsed]: Filed December 16, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 61, inclusive, containing the original:

Complaint.

Order to show cause and Temporary Restraining Order.

Motion to Dismiss, etc.

(Certified Copy) Order restoring and granting Injunction during pendency of Appeal.

(Certified copy) Judgment of Dismissal for Lack of Jurisdiction over the subject matter.

Notice of Appeal.

Request for and Designation of Record and Proceedings to be contained in Record on Appeal.

B. One volume of Reporter's Transcript of Proceedings had on December 6, 1957.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated December 24, 1957.

[Seal]

JOHN A. CHILDRESS,

Clerk,

/s/ By WM. A. WHITE,

Deputy Clerk.

In the United States District Court, Southern
District of California, Central Division

No. 1305-57-T

RICHARD DOUGLAS FURNISH, M.D.,
Plaintiff,

vs.

THE BOARD OF MEDICAL EXAMINERS OF
THE STATE OF CALIFORNIA,
Defendant.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California
December 6, 1957

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For the Plaintiff: Murray M. Chotiner and Russell E. Parsons, 202 South Hamilton Drive, Beverly Hills, California. For the Defendant: Edmund G. Brown, Attorney General, by James L. Mamakos, Deputy Attorney General, 600 State Building, 217 West 1st Street, Los Angeles, California. [1]*

Friday, December 6, 1957, 2:03 P.M.

The Court: Call the case.

The Clerk: 1305-57-T, Richard Douglas Furnish, M.D., v. State Board of Medical Examiners, State of California.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Hearing on plaintiff's order to show cause re temporary restraining order.

The Court: Are you ready?

Mr. Mamakos: Ready, your Honor.

Mr. Chotiner: Ready.

Mr. Parsons: Ready.

The Court: There is a motion to dismiss.

Mr. Mamakos: Yes, your Honor.

At this time I would like to make an oral motion that the motion to dismiss, which is on file, be heard at this time in connection with the order to show cause, if your Honor has had sufficient time to peruse the points and authorities in support of that written motion.

The Court: They were rather extensive, but I did get them read.

Mr. Mamakos: Your Honor, although they are extensive I also would like to indicate a correction in regard to those points and authorities. As your Honor knows, this matter was in this court once previously on another declaratory relief action, and inadvertently my secretary included in the [2] points and authorities authorities with regard to a cause of action stated in the First Complaint and Declaratory Relief, which was omitted by the petitioner in the second. And the authorities on line 24, page 31, to line 29, page 34, of the extensive points and authorities, in support of this present motion to dismiss, should be disregarded and stricken, and I so move your Honor.

The Court: Well, they are already here, so we will let them stay. There are some typographical

errors, too, but you need not correct those. For instance, you cited something, which I think is 59 Cal. (2d), which was a decision handed down within the last six months. I am sure they were way up beyond 59 then.

Mr. Mamakos: I am sorry. No doubt that is reported in the bound volumes.

The Court: Yes.

Mr. Mamakos: If your Honor is willing, I will just briefly mention the points in support of the motion to dismiss, which are elaborated upon quite extensively in the points and authorities.

First of all, your Honor is aware when this matter first came up in this court your Honor granted the motion to dismiss upon the ground that if the petitioner had a remedy, that his remedy was in the United States Supreme Court from the final disposition of the matter by the California State Court. [3]

The petitioner thereupon did petition for a writ of certiorari in the United States Supreme Court, which was duly acted upon by that court in denying that petition.

The petitioner herein also filed a petition for reconsideration of the petition for writ of certiorari, and that also was denied, and I think the entire judicial history with regard to this particular litigation is set forth on line 29, page 1, to line 19, page 5, of the points and authorities in support of the Board of Medical Examiners' motion to dismiss.

Your Honor, I must confess that in researching the problem here I was unable to find, outside of

the criminal habeas corpus field, a situation where a United States District Court, in view of the judicial proceedings already having transpired with regard to this case, has stated that an independent action could be filed in a federal District Court after the state proceedings had been consummated and an appeal taken to the United States Supreme Court, and the determination of that body having become final.

I think the cases cited in the points and authorities in support of the *res adjudicata* ground involve cases where the petitioner had not as yet petitioned the United States Supreme Court for petition of certiorari and there the cases have consistently held that an independent suit in a federal court is a misconceived remedy. [4]

Secondly, your Honor, I would just like to briefly comment on another ground why I believe the petitioner cannot claim the jurisdiction of this court for his alleged grievances, and, that is, that I do believe, with all due respect to the court, that this court is not empowered to concern itself with this type of proceeding.

I think that petitioner's cause of action cannot be heard in a court of this nature, because the federal District Court is not given the power to interfere with final state proceedings, unless some federal ground be stated. I think that the points and authorities in support of the motion are quite specific and elaborate in dealing with that point.

Your Honor, just one final word. This is a matter that has been in litigation for several years,

since the administrative determination in the fall of 1954. The petitioner certainly has had his day in court, he has had several years. I think the points raised in the petitioner's Complaint have been repeatedly asserted, not only in the state court, but in the United States Supreme Court, without success.

I think in the interest of justice and expediency that the matter should not be allowed to continue to be the concern of any further courts.

Thank you.

Mr. Chotiner: First of all, if the court please, I think we have this kind of a situation here: The state, in [5] acting in this matter, is relying on something that happened in the federal court under a federal statute.

In the case of *In Re Hallinan*, which we cited in our points and authorities at page 2, line 21, it specifically states:

"Since Section 145, Subdivision (b),—" the income tax law itself

"—is a United States statute, we must accept the interpretation given it by the United States courts."

The case *In Re Hallinan* sought to disbar an attorney. The Supreme Court of the State of California held, and properly so, they must show moral turpitude, in order to take disciplinary action against an attorney, involved in a violation of the income tax law.

Now, the only difference between the section of the Business and Professions Code as it relates to

a lawyer and as it relates to a doctor is simply this: That when the 1951 amendment was passed, incorporating the provision that a plea of nolo contendere in the case of a doctor could be used as a conviction for the purpose of disciplinary action, they inserted a comma after the word "felony" in the first portion of the section. Before 1951 there was no comma there, so it read: "In the case of a conviction of a felony or any offense involving moral turpitude," so that the "moral turpitude" would be modifying the word "felony" as well as "any offense". [6] In the case of a lawyer they did not put that comma in there.

And it is significant, if the court please, in the portion of the section where they put in about a plea of nolo may be considered as a conviction, a comma was not placed after the word "felony".

Now, it means one of two things has happened. Either inadvertently a comma was put after the word "felony" in the first portion of the section so that mere conviction of a felony standing by itself alone, in the case of a doctor, would be grounds for disciplinary action. Either that was done inadvertently, or if it was done intentionally we can't blow hot in one breath and cold in the other, because then it would mean that the Legislature apparently had in mind, where the state was going to rely on a plea of nolo, for the purpose of sustaining the conviction, that then it would have to be a case that involves moral turpitude.

Nowhere in this case is there any contention that there is any moral turpitude. As a matter of fact,

at the hearing before the administrative hearing officer it was conceded by the State of California that on the basis of the record that they had not sustained their burden of showing that there was any moral turpitude.

Now we come to the situation, taking the points and authorities cited by the Attorney General's Office, for example, on page 30, at line 18, they talk about legislation [7] being permitted for the purpose of determining the qualifications of a doctor to practice within this state. And from the very case that they cite we find this language:

“The only limitation on the above doctrine is the principle that the regulations must be reasonable and must bear some relation to the service to be rendered by the licensee.”

And in this case there is absolutely nothing to indicate that this is done for the purpose of protecting the public health. It is strictly on an income tax matter without any showing whatsoever that the things that got the doctor involved in his income tax troubles resulted from improper practice as a doctor, for example, whether it had been abortions or narcotic traffic, or anything at all that might possibly reflect on him as a doctor. So the question of public health, if the court please, is not involved obviously in this case here.

Now, it is our contention that this court does have the power to act, if it believes under the facts this is a proper case on which to act. We have cited in our points and authorities here, beginning at page 2, line 28, and extending to page 3, line 24,

that every court has the inherent power to enforce its judgments and decrees.

Now, I will be frank to state to your Honor, as Mr. Mamakos stated, I have not found a case that would be specifically [8] right on all fours, and I wish we had been able to find something like it that would help us in the thing. All we can do is take cases by analogy on that situation, and that the court has the power to issue such process as may be necessary to render its judgments and decrees effective. And that the power to enforce the decrees is necessarily incident to the jurisdiction of courts.

And what is particularly important here is that the federal court may stay proceedings in a state tribunal, where it is necessary to protect or effectuate its judgment. That is contained in Section 2283 of Title 28 of the United States Code.

Now, since it is well-settled law, as set forth in our supplemental points and authorities, which were filed this morning—and, frankly, the reason they were not filed sooner, I was proceeding on that undoubtedly the court is familiar with them, but I thought, just to make sure of our record, I would file the points and authorities—and that is that a plea of nolo cannot be used in any other action for the purpose of being used against a defendant.

The Court: Of course, the great problem you have there is what was used is not the plea of nolo, but the judgment of conviction. The plea of nolo is something that you can't go and introduce in

another court as an admission, but the fact of conviction, the fact there is a judgment of conviction [9] is a different thing. Those judgments of conviction often follow from such things as a plea of not guilty and a verdict of guilty. The defendant still insisting he is not guilty, but the jury having said he is, the judge denying a motion for judgment of acquittal, the various other courts in other matters or administrative agencies, such as you have here, might consider the judgment. And I gather from your complaint what happened here was the fact that he had been convicted, the judgment was the conviction, is what is held against him, rather than the way in which the conviction came about, which was by reason of a *nolo contendere* plea, in which he presented the accumulation of a record, in which he said, "Yes, I did it," or a plea of guilty, something to that effect.

Now, there are times when, as you know, the traffic court, when someone has been given a traffic citation in a situation where a personal tort liability is claimed also to exist. The person who is given that citation will sometimes not be willing to go in and plead guilty in the traffic court simply because his announcement that he is guilty would be used in evidence against him, but he will go in and sit through a trial, offer no defense, and the judge finds him guilty, and the judgment is not admissible against him, where the plea of guilty would have been admissible against him as an admission.

Now, in our courts, with the use of *nolo contendere* here, we prevent the situation arising where

such a plea is allowed, of a defendant making evidence against himself by saying, "I am guilty." He simply says, "I do not contend with you." *Nolo contendere*. Hence, it is the admission for the purpose of the case only, that is, it is such a declaration, that removing the allegation of the indictment from controversy it follows there is kind of a judgment by default.

From your complaint here I gather that the doctor is suffering disciplinary action from the administrative agency, not because of what he said when he was asked, "How do you plead," but from what the court did when the court entered a judgment of guilty upon that plea.

Mr. Chotiner: Except, though, if I may point out the situation, it is true that the state is proceeding based on a conviction, but it is a conviction based on a *nolo* plea under the statute. For example, before the 1951 amendment was passed to the Business and Professions Code, apparently, a conviction based on a plea of *nolo*—at least, the Legislature must have thought so—would not have been sufficient to sustain disciplinary action. That is the reason they put into the statute that particular provision.

So while it is true that it is the conviction on which they are proceeding, still under the California statute, it is a conviction based on a *nolo* plea, which forms the foundation [11] for the disciplinary action.

Now, this isn't a case where you might say an individual was just simply hiding behind a plea

of nolo. Here we have in the record the statements made by the judge who sentenced him. And without going to the length of reading all the judge said——

The Court: I have read it twice.

Mr. Chotiner: Your Honor is familiar with it. It is a clear indication that the evidence before the judge is such that it is not a case that involves moral turpitude. Now, if we are going to hold that they cannot take disciplinary action against a lawyer, unless there is moral turpitude, but they can against a doctor, it would appear that that on the face of it would show that it is discriminatory legislation.

We feel, under those circumstances, that the Act itself would be unconstitutional, and if the Act is unconstitutional—of course, we have no objection, your Honor,—you feel there are sufficient grounds to go on the question of unconstitutionality and convene a three-member court. That isn't our point.

Our situation is this: That we feel this court can act individually because of the application and what was done to the doctor, without even finding that the act was unconstitutional. [12]

If the court feels it must proceed through a three-member court, of course, we have no objection to that procedure being followed.

The Court: We do that when the constitutionality of a federal statute is in question. There is no federal statute in question here. In fact, I have not found anywhere in your authorities any citation to a law which gives this court jurisdiction.

Now, I have sympathy for your position, that your client was treated a bit roughly, roughly to the extent of having been suspended for a year, under circumstances which had I been the administrative body I would not have felt justified upon the record as you have pleaded it, if that is the whole record. But I have to look to the jurisdiction of this court. This court is not a court of general jurisdiction. It has such jurisdiction as has been conferred upon it by Acts of Congress.

And looking at various jurisdictional statutes, I cannot find that we have jurisdiction to review or set aside findings of an administrative agency of a sovereign state, or to collaterally adjudicate upon the same controversy, nor are we a Court of Appeals from the court of last resort of California. The Supreme Court of the United States might be, but that depends on whether they granted certiorari. We do not have a power to grant certiorari to this court. [13]

So I can't see that it is a matter within our collar to hear you.

Mr. Chotiner: There is an additional factor, though, that I think does give this court the power to act, and that is, first of all, whether or not we have a situation of an ex post facto law involved here, because that would then definitely, I feel, give us a federal question here.

Now, the state is claiming that what they proceeded on was a conviction that occurred after 1951. And we contend that it is based upon facts that

occurred in 1947 and 1948, which is before the adoption of the 1951 amendment.

We find, even taking the authorities cited by the Attorney General, on page 31, at line 20, where the whole question is whether or not it is the conviction that counts, the court states that the authorities cited, that the vital matter is not the conviction but the violation of the law. And that the former, meaning the conviction, is merely prescribed evidence of the latter, to wit, violation of the law.

Now, before 1951 was concerned—and these years involved are 1947 and 1948—there could not have been any disciplinary action against the doctor, because the comma was not inserted until 1951. It would, therefore, have been necessary for the state to have shown moral turpitude against the doctor.

So what happened was that after 1951, after the plea of [14] *nolo contendere* plea was entered and the conviction was entered on the basis of the *nolo* plea, then they say, "We will now rely on the conviction for the purpose of disciplining Dr. Furnish here, and without the necessity of showing that there was any moral turpitude involved."

Under those circumstances, we feel that this court would have the power to act.

The Court: Yes, but you brought that controversy to a federal court, and your problem is a California problem. I think the California courts, having adjudicated it, even if they adjudicated it differently than I would, they were the ones who had power to do it and I am a bystander. I do not

acquire power just because I might disagree with their decision.

It is just a question of jurisdiction, to come in here and present your case to this court. And I think on the cases you have pleaded we do not have a federal question.

I am sorry to decide it against you, and unless you convince me there is a federal question I am going to do it on the narrow ground that I do not have jurisdiction. You can take an appeal from that and maybe you can get a stay from the Circuit Court while you argue it, and the Circuit Court might reverse me. I think if they were to do that in this case, it might result in substantial justice as a general policy of the architecture of the law and tend toward reducing [15] the confusion and lack of finality in judgments.

Mr. Chotiner: Well, it would appear to me, your Honor,—and I respect your Honor's feeling in the matter—that in the interest of justice it would be far better in this case if a preliminary injunction were granted, allow the state to take the appeal, because what I have in mind is, frankly, the question of the doctor being permitted to practice with 12 patients in a hospital and the doctor associated with him is now ill and not able to take care of them. Frankly, we have a serious problem facing us; not facing us, but facing the patients Dr. Furnish has been treating and taking care of.

The Court: But that kind of a situation cannot vest jurisdiction in a court. The law doesn't say we have the power.

Mr. Chotiner: The only thing I can say in answer to that is simply this: That I think the court has jurisdiction for the reason the federal questions are involved. One is whether or not the state is depriving Dr. Furnish of the privilege of practicing medicine in the State of California by adopting an ex post facto application of the law as to him.

Secondly, that the Act is discriminatory as against him, in view of the fact that in the case of another profession, to wit, that of lawyers, that it is necessary to show moral turpitude by the decision of the California Supreme Court in the case of *In Re Hallinan*. [16]

The Court: I don't know what kind of extraordinary writ would lie to—the appellate court of our Circuit is in session now. They will be until the middle of next week; the three judges here.

If I go ahead with my present intention, declare you out of court for want of jurisdiction to hear you, it might be that a writ of prohibition or something of that kind could be obtained from our Circuit Court to restrain me from signing the judgment, because the judgment will not be signed until five days after it has been submitted. And it is the duty of the prevailing party to submit it.

So you could go there and find out quickly by application for such a writ, find out authoritatively whether I have jurisdiction. I think I do not have.

It has been my judicial training that I should decide cases as the law indicates, rather than as I

would write the law if I were in the Congressional function.

So, although sympathetic to the plaintiff's position, in this particular case as it has been pleaded, I don't think I have the power.

If they are open upstairs they will at least see you and they might entertain your writ.

Mr. Chotiner: Of course, I appreciate your Honor's thought in the matter advising us of the situation, and actually that is the only alternative, you might say, at the [17] moment, that is available to us.

The Court: Well, it is an alternative by which you would determine this question of jurisdiction. You can appeal. Of course, to get a regular appeal heard would mean it would come up sometime after the order of the administrative agency would have been in force for some time, and the 12 patients would either have gotten well or died.

Mr. Chotiner: Unless the stay were granted in the meantime, which of course is another matter.

May I inquire of the court, so we may properly prepare our application for a writ of prohibition, that apparently it is the court's intention to sign such an order dismissing the matter,—

The Court: It is.

Mr. Chotiner: —and also may I inquire, however, if the court under the present circumstances will allow the temporary restraining order, of course, to remain in effect until your Honor does sign the order?

The Court: Yes, the temporary restraining order

will remain in effect until the judgment is signed in this case. The judgment which the court intends to sign is a judgment of dismissal for want of jurisdiction of the subject matter of the action.

The court doesn't know whether prohibition is a proper remedy, but if it isn't—that is the only remedy that comes [18] to mind, and I know it has been used in some very similar circumstances. I think you could test jurisdiction in that way. And I make an emphatic declaration of my intention to sign that judgment, so that you will have a record to take up to the Court of Appeals. All you will need to show my intention, I think, is a transcript of this afternoon's proceedings, and the usual papers you file on applying for a writ of prohibition.

Mr. Chotiner: Well, in the interest of my client—I don't know whether Mr. Parsons has anything to add to convince your Honor of a different course of action, but I will ask the court's indulgence in the event there is, that he be heard also in this matter.

The Court: Certainly.

Mr. Parsons: I might say this, that I can say nothing more than Mr. Chotiner has urged. I don't want to belabor it. Of course, we have lived with this for some time. Of course, there are many lawyers and judges, differences of opinion, but we thought there was a substantial federal question here, because the state is attempting to trespass upon this court's authority. They are using something that occurred here, not over there (indicat-

ing). They are intruding something into your judgments in this court.

A *nolo contendere* plea has never been used, and I sat here and I thought the best illustration—I wondered why I hadn't [19] thought about it—the best illustration I have ever heard of is just what you said a moment ago about the man in the traffic court. He is confronted with a serious lawsuit for damages. When he is arrested and tried in traffic court he just sits there, even if he doesn't offer a defense, because the judgment can't be used against him. But his plea could be, because that is an admission.

Now, it is our contention that the state is attempting to read into this something that is not there. And our only hope is to come here to this court. This court has a duty to protect its judgments.

The Court: Of course, the judgment of the federal court has not been pleaded in verbatim, that is, we do not have a copy of the judgment here. We have Judge Yankwich's oral remarks from which the clerk did prepare the judgments, and it appears from the record that you have pleaded in your complaint that what the administrative agency has done has been to not look to the *nolo contendere* but they have looked to the judgment.

Now, it seems to me that if a sovereign body, such as the State of California, wants to look to a judgment as a form of evidence, they may do so. They do it in *res judicata*, and I think in other instances they sue upon the judgment in order to

get a new one, not having collected the first one before the statute of limitations is about to run. The judgment is [20] brought in as evidence.

I think what this Board of Medical Examiners has been doing is to look to the judgment—at least, that is the inference we draw from what is set forth in the pleadings—rather than to look to the plea which resulted in the judgment. If Dr. Furnish had been convicted by evidence, after a plea of not guilty, they could have done that.

So the idea that I had for a time after you filed this Complaint that this court might have jurisdiction, because we have power to protect our judgments, doesn't have validity as you examine it because we can take judicial notice that the judgment has been satisfied. The judgment hasn't been attacked in any way. There isn't any attempt to reek anything more from the judgment than it provides.

If the State of California wants to say that a conviction of income tax evasion shall be evidence of moral turpitude, they can do that, just as in the federal system we say that evidence of a transfer of property under certain conditions shall, in the event of bankruptcy, be evidence of fraud, although there is an inability to prove any actual fraud. It just becomes something that exists in contemplation of law.

In your state law you have the bulk sales law and so on, where a fraud is presumed from certain transactions. I think those kind of presumptions might be drawn from just the fact of a judgment, regardless of how the judgment was arrived at. [21]

So we have no duty here or power to act to protect our judgment in this court, because no one is attacking the judgment of this court. They are simply using it as evidence. Under the separation of powers, the state having theirs and the national government having its powers, if they want to establish a system by which they consider a judgment evidence, they have power to do so. And if they have that power, if their courts make a mistake it is their courts that do it, and their courts that have the power, and the power to decide includes the power to occasionally make a mistake and decide incorrectly.

But there is nothing in the statutes, insofar as they have been pointed out to me, which gives this court a power to step in and revise the state court's action.

Now, I perhaps have talked more than I should, because it has been rather wordy. But I think if you go up to get your writ of prohibition you will need this transcript. My only request in that connection is that in order to preserve the context, if you take any you take all.

Mr. Parsons: Well, we will take all. Let me say, from the beginning, whatever you have said I will say has been helpful to me in properly appraising the case and attempting to determine what to do. And I hope you forgive me for disagreeing with you, as I am but a humble lawyer, but I think it is the duty of this court to protect its judgments, and [22] this whole thing flows from the *nolo contendere* plea.

The Court: That wasn't a judgment, though. The *nolo contendere* plea was not a judgment. It is no act of the court, it is an act of the defendant.

Mr. Parsons: Yes, but the judgment is based on that, and the Supreme Court of California itself recognized that in construing the effect and breadth and width of a *nolo contendere* plea they had to look to the federal courts as to what they had said about it. And they adopted that, and properly so.

We earnestly contend that this court does have the right to protect its judgments and does have the jurisdiction. Otherwise, they can do what they please with a man, and they do not have that power. They are brought to task continually in the state courts under due process, for denying people rights along the way that have been carved out.

The Court: Well, if they prohibit me from signing the judgment, which I take it the Attorney General will present here within five days, I will be glad to hear your case.

Mr. Parsons: Very well.

The Court: But unless they prohibit me from signing such a judgment, if the Attorney General is reasonably prompt in getting it in, one will be signed dismissing the case solely for want of jurisdiction.

Mr. Parsons: Very well. Thank you for [23] courteously hearing this at this point.

The Court: Thank you. It is always interesting to have you here and helpful. It is stimulating to have good lawyers come into one's court.

Court is adjourned.

(Whereupon, at 2:45 o'clock p.m., Friday, December 6, 1957, an adjournment was taken.)

[Endorsed]: Filed December 10, 1957.

[Endorsed]: No. 15835. United States Court of Appeals for the Ninth Circuit. Richard Douglas Furnish, Appellant, vs. The Board of Medical Examiners of the State of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 26, 1957.

Docketed: December 30, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15835

RICHARD DOUGLAS FURNISH, M.D.,
Appellant,
vs.

THE BOARD OF MEDICAL EXAMINERS OF
THE STATE OF CALIFORNIA, et al.,
Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

On November 10, 1955, the Board of Medical Examiners of the State of California made an order suspending appellant for one year from the practice of medicine and surgery in the State of California, after a hearing before the Board's Hearing Officer, who proposed that appellant be suspended for one year, and that execution be stayed and appellant be placed upon probation for three years; the Hearing Officer's proposal was rejected by the Board.

The Order of suspension was based on the appellant's plea of nolo contendere to two counts of violating Title 26, United States Code, Section 145(b) (income tax) for the years 1947 and 1948.

Counsel for the Board of Medical Examiners, at the hearing before the Hearing Officer, stipulated that the Board of Medical Examiners, in its action

against the appellant, did not seek to discipline him for the conviction of an offense involving moral turpitude; and that the record did not establish that the convictions relied on did in fact involve moral turpitude; and that the Board did not sustain the burden of proof on the issue of moral turpitude.

Appellant intends to rely on the following points:

1. The stigma which follows and attaches to conviction of a felony is not considered to attach and follow a conviction under a *nolo contendere* plea.

2. A plea of *nolo contendere* does not carry with it any of the civil penalties, nor does it carry a suspension of civil rights.

3. At the time the offenses were alleged to have been committed, namely, income tax evasion for the years 1947 and 1948, Section 2383 of the California Business and Professions Code provided "the conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of conviction is conclusive evidence of such unprofessional conduct."

The Section was amended in 1951 by inserting a comma after the words "the conviction of a felony" and there was added "a plea or verdict of guilty or a conviction following a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this Section. * * *"

It is therefore urged that the Board of Medical Examiners, in applying the law as enacted in 1951

rather than the law as it was in 1947 and 1948, has invoked an "ex post facto law" and thus the law itself and its application is unconstitutional and in violation of Article I, Section 10 of the United States Constitution. That the application of such an ex post facto law amounts to a denial of due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

4. A nolo contendere plea is insufficient to warrant the suspension of the appellant where there is no affirmative proof of moral turpitude, and in this case Judge Leon Yankwich, the trial Judge, in effect held that there was no moral turpitude by his remarks at the time of the imposition of sentence.

5. A conviction based on a plea of nolo contendere cannot be used in any other case.

6. The Medical Board is guilty of an intrusion into the processes of the Federal Court and has attached a penalty to the appellant which is not prescribed by law.

7. Every court has inherent power to enforce its judgments and decrees, and may issue such process as may be necessary to render the court's judgments and decrees effective.

8. The Federal Court may stay proceedings in a State tribunal where necessary to protect or effectuate its judgment.

9. At the time the Legislature adopted the 1951 amendment to Section 2383 of the California Business and Professions Code it either inserted a comma after the word "felony" inadvertently or

intended to do so. In the event it intended to do so for the purpose of making a conviction of a felony without involving moral turpitude a ground for disciplinary action, it is clear the Legislature did not have in mind that a plea of nolo contendere to a felony not involving moral turpitude would come within the class of cases subjecting a physician and surgeon to disciplinary action, since it did not insert a comma after the word "felony" in the portion of the Section dealing with a plea of nolo contendere.

10. In the case of an attorney it is necessary to show moral turpitude in order that a conviction be cause for disciplinary action under Section 6101 of the California Business and Professions Code. In the case of an attorney the State Legislature did not insert a comma after the word "felony", as it did in the case of a doctor.

Respectfully submitted,

MURRAY M. CHOTINER and
RUSSELL E. PARSONS,

/s/ By MURRAY M. CHOTINER,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 31, 1957. Paul P. O'Brien, Clerk.

No. 15835

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF
CALIFORNIA,

Appellee.

Petition to Review a Decision of the United States District
Court.

APPELLEE'S BRIEF.

EDMUND G. BROWN,
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Attorneys for Appellee.*

FILE

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TOPICAL INDEX

	PAGE
Statement of the case and statement of facts.....	1
Issues	4
Argument	5

I.

The District Court does not have jurisdiction over the subject matter in the instant case.....	5
--	---

II.

Appellant is barred by the doctrine of res judicata.....	16
The issues presented by appellant's complaint have been litigated before the California courts and the United States Supreme Court; consequently the doctrine of res judicata is a complete bar to the instant action.....	16
Conclusion	19

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Surety Co. v. Baldwin, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A. L. R. 298.....	6
Bacon v. Rutland Railway Co., 232 U. S. 134, 34 S. Ct. 283, 58 L. Ed. 538.....	17
Baker Driveway Co. v. Hamilton, 29 Fed. Supp. 693.....	6
Briggs v. United States Machinery Co., 239 U. S. 48, 365 S. Ct. 6, 60 L. Ed. 138.....	6
Chirillo v. Lehman, 38 Fed. Supp. 65, aff'd 312 U. S. 662, 61 S. Ct. 741, 85 L. Ed. 1108.....	6
Clark v. Memolo, 174 F. 2d 978.....	9
Coeur D'Alene Ry. & Nav. Co. v. Spalding, 93 Fed. 280.....	10
Collins v. LaCledde Gas Company, 237 F. 2d 633.....	15
Consolidated Freightways, Inc. v. Railroad Commission of Cali- fornia, 36 Fed. Supp. 269.....	16
Continental National Bank v. Holland Banking Co., 66 F. 2d 823	7
Davega-City Radio v. Boland, 23 Fed. Supp. 969.....	7
Detroit & Mackinac Railway Co. v. Michigan Railway Commis- sion, 203 Fed. 864.....	17
Furnish v. Board of Medical Examiners, 149 Cal. App. 2d 326, 308 P. 2d 924, 309 P. 2d 493, cert. den. 78 S. Ct. 37, 2 L. Ed. 2d 40, rehear. den. 78 S. Ct. 139, 2 L. Ed. 110.....	2, 3, 5, 9, 10, 12, 16
Gillis v. State of California, 293 U. S. 62, 55 S. Ct. 4, 79 L. Ed. 199	6
Grubb v. Public Utilities Commission, 281 U. S. 470, 50 S. Ct. 374, 74 L. Ed. 972.....	18
H. J. Heinz Co. v. Owens, 189 F. 2d 505, rehear. den. 191 F. 2d 257, cert. den. 342 U. S. 905, 72 S. Ct. 294, 96 L. Ed. 677, rehear. den. 342 U. S. 934, 72 S. Ct. 374, 96 L. Ed. 696	10, 11

Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 S. Ct. 506, 61 L. Ed. 1148.....	18
Hill v. Martin, 296 U. S. 393, 56 S. Ct. 278, 80 L. Ed. 293.....	10
Home Insurance Co. of New York v. Trotter, 130 F. 2d 800....	9
Illinois Terminal R. Co. v. Friedman, 208 F. 2d 675, rehear. den. 210 F. 2d 229.....	11
Kline v. Burke Const. Co., 260 U. S. 226, 34 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077.....	6
Mills v. Provident Life & Trust Co., 100 Fed. 344.....	10
Napa Valley Electric Co. v. Railroad Commission of California, 257 Fed. 197, aff'd 251 U. S. 366, 40 S. Ct. 174, 64 L. Ed. 310	17
Norwood v. Parenteau, 228 F. 2d 148, cert. den. 351 U. S. 955, 76 S. Ct. 852, 100 L. Ed. 1478.....	12, 13, 15
Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 43 S. Ct. 353, 67 L. Ed. 659.....	17
Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 60 S. Ct. 215, 84 L. Ed. 537.....	10
Railroad and Warehouse Commission of Minnesota v. Duluth Street Railway Co., 273 U. S. 625, 47 S. Ct. 489, 71 L. Ed. 807	17
Ritholz v. North Carolina State Board, 18 Fed. Supp. 409.....	6
Seligman's Inc. v. United States, 30 Fed. Supp. 895.....	6
Sexton v. Barry, 233 F. 2d 220.....	8
Smith v. Duldner, 175 F. 2d 269.....	18
State Corporation Commissioner of Kansas v. Wichita Gas Co., 290 U. S. 561, 54 S. Ct. 321, 78 L. Ed. 500.....	17
Toucey v. New York Life Ins. Co., 314 U. S. 118, 62 S. Ct. 139, 86 L. Ed. 100.....	10

	PAGE
Wallace Ranch Water Co. v. Railroad Commission, 47 F. 2d 8	18
West Virginia Motor Truck Assn. v. Public Service Commis- sion of West Virginia, 123 Fed. Supp. 206.....	18

RULES

Federal Rules of Civil Procedure, Rule 8(a).....	11
Rules of the United States Court of Appeals for the Ninth Circuit, Rule 18(2)(b)(1).....	11

STATUTES

Business and Professions Code, Sec. 2383.....	1, 5, 12
United States Code, Title 26, Sec. 145(b).....	1, 5, 12
United States Code, Title 28, Sec. 1257.....	13
United States Code, Title 28, Sec. 1291.....	11
United States Code, Title 28, Sec. 2283.....	9, 10, 11

No. 15835
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF
CALIFORNIA,

Appellee.

Petition to Review a Decision of the United States District
Court.

APPELLEE'S BRIEF.

Statement of the Case and Statement of Facts.

After appellant was charged with having been convicted of two counts of violation of Title 26 U. S. C. Sec. 145(b), felonies, in violation of Section 2383 of the Business and Professions Code of the State of California, the appellee, the Board of Medical Examiners of the State of California, on November 10, 1955 suspended the appellant from the practice of medicine and surgery in the State of California for one year. [Tr. of Rec. pp. 3-4 4-8, 10-11, 36-37.]

Appellant then sought a Writ of Mandate from the Superior Court of the State of California, in and for the County of Los Angeles, to set aside the decision of the Board of Medical Examiners of the State of California. [Tr. of Rec. pp. 12-13.]

After the said Superior Court dismissed appellant's Petition for Writ of Mandate, appellant appealed to the District Court of Appeal of the State of California, which affirmed the Superior Court's judgment dismissing appellant's Petition for Writ of Mandate. [Tr. of Rec. pp. 12-13.]

On April 9, 1957 appellant's Petition for Rehearing in the District Court of Appeal was denied. [Tr. of Rec. p. 13.]

Appellant's application to the District Court of Appeal to grant a rehearing on its own motion was denied on April 19, 1957. [Tr. of Rec. p. 13.]

On May 15, 1957 appellant's Petition for Hearing in the California Supreme Court was denied by said California Supreme Court. [Tr. of Rec. p. 13.]

Furnish v. Board of Medical Examiners, 149 Cal. App. 2d 326, 333; 308 P. 2d 924; 309 P. 2d 493.

Appellant's Petition for Writ of Certiorari in the Supreme Court of the United States was denied on October 14, 1957. [Tr. of Rec. p. 13.]

Furnish v. Board of Medical Examiners of the State of California, 78 S. Ct. 37, 2 L. Ed. 2d 40.

On November 18, 1957 appellant's Petition for Rehearing of appellant's Petition for Writ of Certiorari was denied by the United States Supreme Court. [Tr. of Rec. p. 13.]

Furnish v. Board of Medical Examiners of the State of California, 78 S. Ct. 139, 2 L. Ed. 2d 110.

On November 25, 1957 appellant filed a Complaint in the United States District Court, Southern District of California, Central Division, No. 1305-57T, against the Board of Medical Examiners of the State of California seeking declaratory relief and an injunction to restrain the California Medical Board from suspending the appellant from the practice of medicine for one year in the State of California and to declare the rights of appellant. [Tr. of Rec. pp. 3-17.]

On November 25, 1957 the Honorable Ernest A. Tolin, United States District Judge, issued an Order to Show Cause and Temporary Restraining Order, restraining the California Medical Board from suspending appellant from the practice of medicine pending the hearing on the Order to Show Cause. [Tr. of Rec. pp. 17-18.]

On December 4, 1957 the appellee, Board of Medical Examiners of the State of California, filed a Motion to Dismiss for Failure of Appellant to State a Cause Entitling Him to Relief and for Lack of Jurisdiction Over the Subject Matter. [Tr. of Rec. pp. 19-20.]

On December 16, 1957, following a hearing on December 6, 1957, the United States District Court sustained

appellee's motion to dismiss for lack of jurisdiction and entered a Judgment of Dismissal for Lack of Jurisdiction Over the Subject Matter. [Tr. of Rec. pp. 22-23, 25-46.]

On December 16, 1957 the District Court granted appellant's motion and made an Order Restoring and Granting Injunction During Pendency of Appeal, enjoining and restraining the California Medical Board from enforcing its Order of November 10, 1955 suspending appellant from practicing medicine and surgery in the State of California. [Tr. of Rec. pp. 20-21.]

Issues.

Succinctly stated, appellee's major contentions are as follows:

1. The United States District Court does not have jurisdiction to enjoin the enforcement of appellee's order suspending appellant from the practice of medicine and surgery in the State of California for one year. Appellant's complaint in the District Court and his Opening Brief before this Honorable Court fail to disclose the basis upon which the District Court had jurisdiction to entertain said complaint.

2. The Doctrine of *Res Judicata* prevents appellant from relitigating the propriety of appellee's order suspending appellant for one year from the practice of medicine and surgery in the State of California.

ARGUMENT.

I.

The District Court Does Not Have Jurisdiction Over the Subject Matter in the Instant Case.

On November 10, 1955 the Board of Medical Examiners of the State of California made an order suspending appellant for one year from the practice of medicine and surgery in the State of California. [Tr. of Rec. pp. 3-4.] This order was promulgated after appellee found that appellant had been convicted of two counts of violation of Title 26 U. S. C. Sec. 145(b), felonies, in violation of Section 2383 of the Business and Professions Code of the State of California. (App. Op. Br. pp. 2-3.) Following appellee's order appellant:

“ . . . exhausted all of his remedies available to him in the State Courts of California, and certiorari was denied by the United States Supreme Court when appellant sought to review the decision of the State Court dismissing appellant's petition for writ of mandate to set aside the decision of the Board of Medical Examiners.” [Tr. of Rec. pp. 12-13.] (App. Op. Br. p. 5.)

Furnish v. Board of Medical Examiners, 149 Cal. App. 2d 326, 333; 308 P. 2d 924; 309 P. 2d 493 (certiorari denied 78 S. Ct. 37, 2 L. Ed. 2d 40; rehearing denied 78 S. Ct. 139, 2 L. Ed. 2d 110).

Appellant filed his complaint against appellee in the District Court, seeking declaratory relief and an injunction to restrain appellee from executing its order suspending appellant from the practice of medicine and

surgery in the State of California for one year after the United States Supreme Court denied appellant's Petition for Rehearing of his Petition for Writ of Certiorari on November 18, 1957. [Tr. of Rec. pp. 13, 17; App. Op. Br. pp. 1, 5.]

It is respectfully submitted that since appellant has exhausted his remedies in the California State Courts and having been denied review by the United States Supreme Court, he cannot now obtain a review of appellee's order by an independent suit in a federal District Court.

The federal District Courts do not derive their jurisdiction directly from Article III of the United States Constitution but are created by and acquire their jurisdiction from Acts of Congress.

Gillis v. State of California, 293 U. S. 62, 66;
55 S. Ct. 4; 79 L. Ed. 199;

Kline v. Burke Const. Co. 260 U. S. 226, 233-234;
34 S. Ct. 79; 67 L. Ed. 226; 24 A. L. R. 1077;

Briggs v. United States Machinery Co., 239 U. S.
48; 365 S. Ct. 6; 60 L. Ed. 138;

Seligman's Inc. v. United States, 30 Fed. Supp. 895,
900.

A judgment of a state court cannot be reviewed by a bill in equity in a federal court.

American Surety Co. v. Baldwin, 287 U. S. 156,
169; 53 S. Ct. 98; 77 L. Ed. 231; 86 A. L. R.
298;

Chirillo v. Lehman, 38 Fed. Supp. 65, 67 (affirmed
312 U. S. 662, 61 S. Ct. 741, 85 L. Ed. 1108);

Baker Driveaway Co. v. Hamilton, 29 Fed. Supp.
693, 694;

Ritholz v. North Carolina State Board, 18 Fed.
Supp. 409, 413.

Neither the District Court nor the Circuit Court of Appeals has power by way of review or otherwise to re-litigate issues tried and determined by the state court.

Continental National Bank v. Holland Banking Co.,
66 F. 2d 823, 829.

In *Davega-City Radio v. Boland*, 23 Fed. Supp. 969, plaintiff brought action to enjoin the New York State Labor Relations Board from enforcing against the plaintiff a New York labor law. A court of three judges was convened.

The District Court of three judges in granting defendant's motion to dismiss the complaint stated at page 970:

“ . . . There is also a further reason why the suit must be dismissed, namely, the principle that a decision of a state court may not be reviewed by bill in equity in a federal court. *American Surety Co. v. Baldwin*, 287 U. S. 156, 164, 53 S. Ct. 98, 100, 77 L. Ed. 231, 86 A. L. R. 298; *Lynch v. International Banking Corp.*, 9 Circ., 31 F. 2d 942, certiorari denied, 280 U. S. 571, 50 S. Ct. 28, 74 L. Ed. 624; *Furnald v. Glenn*, 2 Cir., 64 F. 49, 54; *Ritholz v. North Carolina State Board*, D. C. M. D. N. C., 18 F. Supp. 409, 413. Here the plaintiff has presented to the state court the same questions as to the jurisdiction of the state Board that it wishes this court to decide. The issue having been decided adversely to it, its remedy is appeal through the appropriate state courts and, if necessary, review by the Supreme Court of the United States. It cannot obtain a review by this independent suit in the federal court. . . .”

In *Sexton v. Barry*, 233 F. 2d 220, at page 225 the Court declared:

“ . . . What appellant asks is that this court order the District Court to relitigate the same issues which have now been finally disposed of by the Supreme Court of Ohio in a judgment binding on this court. As held by this court in *General Exporting Co. v. Star Transfer Line*, 6 Cir., 136 F. 2d 329, 335, a federal District Court will not function as a court of review for the state court. The District Court there dismissed an action praying that proceedings in the state court be declared null, void, and of no effect and this court affirmed the decision of the District Court, stating:

“ ‘The attempt to relitigate in federal courts issues already determined in state courts proceedings has been disapproved in numerous opinions of United States Courts below the grade of the Supreme Court. *Ritholz v. North Carolina State Board of Examiners in Optometry*, D. C. N. C., 18 F. Supp. 409, 413 (three-judge court); *Davega-City Radio v. Boland*, D. C. N. Y., 23 F. Supp. 969, 970 (three-judge court); *Hall v. Ames*, 1 Cir., 190 F. 138, 140, 141; *Furnald v. Glenn*, 64 F. 49, 54.’ ”

The fact that appellant has filed a complaint seeking declaratory relief and an injunction does not enlarge the District Court's jurisdiction.

The Declaratory Judgment Act did not enlarge the jurisdiction of the Federal District Courts nor alter the character of the controversies which are the subject of the judicial powers under the Constitution.

In *Clark v. Memolo*, 174 F. 2d 978, the Court at page 980 said:

“It is well settled that the Declaratory Judgment Act does not confer or extend jurisdiction over an area not already covered, nor can it be used to give relief indirectly which could not be given directly. It does not enlarge the jurisdiction of district courts. (Citing cases.)”

At page 981 the court said:

“The Declaratory Judgment Act was designed to provide a remedy in a case or controversy while there is still opportunity for peaceable judicial settlement. It was the primary purpose of the act to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated.”

See also:

Home Insurance Co. of New York v. Trotter, 130 F. 2d 800, 803.

As hereinabove set forth, appellant is seeking to obtain an injunction from the lower court restraining the enforcement of appellee's order of suspension against appellant after having appealed from appellee's order to the California state Courts.

Furnish v. Board of Medical Examiners, *supra*, 149 Cal. App. 2d 326, 333, 308 P. 2d 924, 309 P. 2d 493 (cert. den. 78 S. Ct. 37, 2 L. Ed. 2d 40; rehear. den. 78 S. Ct. 139, 2 L. Ed. 2d 110).

Title 28 U. S. C., Section 2283, provides:

“A court of the United States may not grant an injunction to stay proceedings in a State court except

as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”

Title 28 U. S. C., Section 2283, has been construed as prohibiting interference with proceedings for the enforcement of a judgment of a state Court.

Toucey v. New York Life Ins. Co., 314 U. S. 118, 62 S. Ct. 139, 148, 86 L. Ed. 100;

Mills v. Provident Life & Trust Co., 100 Fed. 344.

See,

Hill v. Martin, 296 U. S. 393, 403, 56 S. Ct. 278, 283, 80 L. Ed. 293.

Appellee's order of suspension against appellant has been sanctioned by judgments of California state Courts.

Furnish v. Board of Medical Examiners, *supra*.

By seeking an injunction against appellee, appellant cannot circumvent the prohibition of Section 2283. It has been expressly determined that the prohibition of Section 2283 cannot be avoided by framing an injunction as a restraint on a party litigant rather than directly against the state Court itself.

H. J. Heinz Co. v. Owens, 189 F. 2d 505, 507 (rehear. den. 191 F. 2d 257; cert. den. 342 U. S. 905, 72 S. Ct. 294, 96 L. Ed. 677; rehear. den. 342 U. S. 934, 72 S. Ct. 374, 96 L. Ed. 696);

Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 60 S. Ct. 215, 84 L. Ed. 537;

Coeur D'Alene Ry. & Nav. Co. v. Spalding, 93 Fed. 280.

In the *Heinz* case, *supra*, at page 507, this Honorable Court, in discussing Section 2283, said:

“Many years ago this court construed that section [28 U. S. §2283] as prohibiting interference with proceedings for the enforcement of a judgment of a state court. *Mills v. Provident Life & Trust Co.*, 9 Cir., 1900, 100 F. 344. More recently, the Supreme Court has adhered to the same doctrine saying that ‘proceedings in a state court’ within the meaning of Section 2283 include ‘any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective.’ *Hill v. Martin*, 1935, 296 U. S. 393, 403, 56 S. Ct. 278, 283, 80 L. Ed. 293.”

Since the lower federal Courts are Courts of limited jurisdiction and can exercise only such powers as Congress, within the limits of the Constitution, confers upon them, it is incumbent upon the litigant seeking that forum to show that the District Court has jurisdiction to hear the cause.

Fed. Rules, Civ. Proc., Rule 8(a), 28 U. S. C. A.;
Illinois Terminal R. Co. v. Friedman, 208 F. 2d
675 (rehear. den. 210 F. 2d 229).

Appellant has failed to comply with Rule 18(2)(b)(1) of Rules of the United States Court of Appeals for the Ninth Circuit in that appellant has not specified to this Honorable Court what statutory provisions, if any, convey jurisdiction to the District Court to entertain the instant matter. Said Rule 18(2)(b) provides that appellant’s statement of the pleadings and facts “. . . shall refer distinctly (1) to the statutory provisions believed to sustain the jurisdictions [of the District Court and the United States Court of Appeals for the Ninth Circuit].” Appellant has merely cited Title 28, United States Code, Section 1291, in invoking the jurisdiction of this Honorable

Court but has failed to expressly cite any statutory provisions enlisting the jurisdiction of the District Court. It is submitted that appellant's failure is due to the fact that there is no statute which confers jurisdiction to the District Court to hear the instant matter. As set forth in appellee's Statement of the Case and Statement of the Facts, appellant was disciplined by the appellee for having suffered two felony convictions (two counts of violation of U. S. C. 145(b) in violation of Section 2383 of the Business and Professions Code of the State of California). Thereafter appellant sought review in the appellate Courts of the State of California and having exhausted his state Court remedies, sought Certiorari in the United States Supreme Court. After that Honorable Court denied his Petition for Writ of Certiorari and Petition for Rehearing of his Petition for Writ of Certiorari, appellant brought his Declaratory Relief Complaint and Injunction action before the United States District Court, re-asserting in that proceeding the same grievances and re-presenting the same issues to the District Court which he had earlier unsuccessfully lodged with the California State Courts and the United States Supreme Court.

Furnish v. Board of Medical Examiners, supra (149 Cal. App. 2d 326, 333, 308 P. 2d 924, 309 P. 2d 493) (cert. den. 78 S. Ct. 37, 2 L. Ed. 2d 40; rehear. den. 78 S. Ct. 139, 2 L. Ed. 2d 110).

In *Norwood v. Parenteau*, 228 F. 2d 148 (cert. den. 351 U. S. 955, 76 S. Ct. 852, 100 L. Ed. 1478), the facts are strikingly similar to those of the present case. There the appellant brought an action in the United States District Court for the District of South Dakota, seeking to have a decision of the Supreme Court of South Dakota declared null and void and demanding redress from members of the State Board of Examiners in Optometry of

the State of South Dakota, its officers and certain state judges, on the ground that those parties collaborated to wrongfully deprive appellant of his license to practice optometry in the State of South Dakota.

The South Dakota State Board of Examiners in Optometry, after holding a hearing upon an accusation charging appellant with unprofessional conduct, found appellant guilty of a violation of its rules and revoked his license.

The decision of the Board was affirmed by the South Dakota State Courts.

Appellant then brought an action in the United States District Court for the District of South Dakota asserting that the South Dakota statute and the Board rules were repugnant to the Constitution of the United States, that appellant's federal rights were involved and that therefore he was entitled to an injunction against the Board of Optometry from interfering with his practice and damages for instigating the action against him.

From a dismissal with prejudice on the ground that the complaint did not state a cause of action by the District Court, the appellant appealed to the Circuit Court.

The appellant had conceded that his prescribed remedy for an appeal from the South Dakota Supreme Court was to the United States Supreme Court (28 U. S. C., Sec. 1257), but attempted to excuse his failure because of economic reasons.

In affirming the District Court's dismissal (*Norwood v. Parenteau*, 228 F. 2d 148), the Court said, at page 150:

"The primary grievance which appellant is attacking is the optometry statute, *supra*, which he claims is unconstitutional in that it deprives him of his right to practice his profession and doing by indirection

what it could not do directly. Without further reference to this contention, we must hold that this court and the United States District Courts are not the proper forums to which an appeal from a State Supreme Court may be taken.

“Where an adequate state remedy is available and that remedy is employed, the party using it cannot escape the results of the action by a mere change from state to federal courts. *Davega-City Radio v. Boland*, D. C. N. Y. 1938, 23 F. Supp. 969; *New Jersey Chiropractic Ass’n v. State Board*, D. C. N. J. 1948, 79 F. Supp. 327. The state action is *res judicata* to all subsequent actions; there is left only appeal to the United States Supreme Court under Title 28 U. S. C. §1257. *American Surety Co. v. Baldwin*, 1932, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231; *Mitchell v. First Nat. Bank of Chicago*, 1901, 180 U. S. 471, 21 S. Ct. 418, 45 L. Ed. 627; *Blythe v. Hinckley*, 1899, 173 U. S. 501, 19 S. Ct. 497, 43 L. Ed. 783.

“‘Congress . . . has maintained upon the statute book such provisions as it deemed needful for reviewing judicial proceedings in the state courts involving a denial of federal rights, but has confined them to a direct review by this court, and deferred this until final judgment or decree in the state court of last resort.’ *Essanay Film Mfg. Co. v. Kane*, 1922, 258 U. S. 358, 361, 42 S. Ct. 318, 319, 66 L. Ed. 658.

“In dealing with ‘. . . a bill in equity to have a judgment of a circuit court in Indiana, which was affirmed by the Supreme Court of the state, declared null and void, and to obtain other relief dependent on that outcome’, the Supreme Court of the United States, in *Rooker v. Fidelity Trust Co.*, 1923, 263 U. S. 413, 44 S. Ct. 149, 68 L. Ed. 362, stated:

“ ‘Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. Judicial Code, §237, as amended by Act Sept. 6, 1916, c. 448, §2, 39 Stat. 726. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. Judicial Code, §24.’ ” (Emphasis added.)

Concluding, the court said, at page 150:

“A federal court cannot enjoin the action of a state court at any stage of the proceedings except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments. 28 U. S. C. §2283. This prohibition ‘is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process.’ Hill v. Martin, 1935, 296 U. S. 393, 403, 56 S. Ct. 278, 282, 80 L. Ed. 293. The state court cannot be ignored. Lion Bonding Co. v. Karatz, 1923, 262 U. S. 77, 43 S. Ct. 480, 67 L. Ed. 871.” (Emphasis added.)

The facts in the *Norwood* case strikingly parallel the facts in the instant case with one significant variation to the instant appellant’s detriment. The instant appellant brought his action in the District Court *after* unsuccessfully seeking a Petition for Writ of Certiorari and a Rehearing upon his Petition for Writ of Certiorari from the United States Supreme Court whereas the appellant in the *Norwood* case renounced that right.

See, also,

Collins v. LaCledé Gas Company, 237 F. 2d 633,
636.

II.

Appellant Is Barred by the Doctrine of Res Judicata.

The Issues Presented by Appellant's Complaint Have Been Litigated Before the California Courts and the United States Supreme Court; Consequently the Doctrine of Res Judicata Is a Complete Bar to the Instant Action.

Appellant is further precluded from litigating his action by the Doctrine of *Res Judicata*. The identical issues presented in appellant's complaint were heretofore presented to the California State Courts and to the United States Supreme Court.

Furnish v. Board of Medical Examiners, supra (149 Cal. App. 2d 326, 333, 308 P. 2d 924, 309 P. 2d 493) (cert. den. 78 S. Ct. 37, 2 L. Ed. 2d 40; rehear. den. 78 S. Ct. 139, 2 L. Ed. 2d 110).

In *Consolidated Freightways, Inc. v. Railroad Commission of California*, 36 Fed. Supp. 269, plaintiff sought to enjoin Railroad Commission of the State of California from enforcing its order directing plaintiff to cease and desist from charging and collecting rates less than the minimum imposed for the transportation of property in the City and County of San Francisco by defendant. Addressing itself to defendant's first defense of *res judicata*, i.e., that the subject matter of the action had been litigated before the Supreme Court of California and was therefore *res judicata*, the court at page 270 identified the question before it as:

"Is an order of the Railroad Commission of the State of California, upheld by the State Supreme Court in its ruling denying a writ of review, a bar to further litigation on the same subject matter in this tribunal?"

In answering this question in the affirmative the Federal District Court cited *Napa Valley Electric Co. v. Railroad Commission of California*, 257 Fed. 197 (affirmed by the Supreme Court, 251 U. S. 366, 40 S. Ct. 174, 64 L. Ed. 310).

In *Napa Valley Electric Co. v. Railroad Commission of California*, *supra*, at pages 198-199, involving a similar question, the District Court declared:

“In this state of the case I am unable to perceive how the objection that the action of the state court is conclusive of the controversy, and that plaintiff is now precluded from bringing the same grievance here, may be avoided. It has had its day in court. . . . While it might have sought a review of the decision of the state court at the hands of the Supreme Court of the United States by appropriate proceedings . . . it did not see fit to do so, and it cannot now be heard to litigate the controversy anew in this court. . . .”

See,

State Corporation Commissioner of Kansas v. Wichita Gas Co., 290 U. S. 561, 54 S. Ct. 321, 78 L. Ed. 500;

Railroad and Warehouse Commission of Minnesota v. Duluth Street Railway Co., 273 U. S. 625, 47 S. Ct. 489, 71 L. Ed. 807;

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 43 S. Ct. 353, 67 L. Ed. 659;

Bacon v. Rutland Railway Co., 232 U. S. 134, 34 S. Ct. 283, 58 L. Ed. 538.

In *Detroit & Mackinac Railway Co. v. Michigan Railway Commission*, 203 Fed. 864, the plaintiff sought an injunction in the United States District Court against cer-

tain orders of the Michigan Railway Commission after having litigated these questions in the State Courts. Although many questions were presented, the court found it necessary to consider only one question, *i.e.*, whether or not the matter was *res judicata* by reason of the action of the Michigan State Courts. The court held that the defense of *res judicata* prevented plaintiff from trying the same controversy over again in that court. The decree denying injunction was affirmed by the United States Supreme Court, 235 U. S. 402, 405, 35 S. Ct. 126, 59 L. Ed. 288, 289.

See, also,

Grubb v. Public Utilities Commission, 281 U. S. 470, 50 S. Ct. 374, 74 L. Ed. 972;

Smith v. Duldner, 175 F. 2d 269, 630-631;

Wallace Ranch Water Co. v. Railroad Commission, 47 F. 2d 8;

West Virginia Motor Truck Assn. v. Public Service Commission of West Virginia, 123 Fed. Supp. 206.

In *Hart Steel Co. v. Railroad Supply Co.*, 244 U. S. 294, 299, 37 S. Ct. 506, 61 L. Ed. 1148, the United States Supreme Court stated:

“This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, ‘of public policy and of private peace,’ which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect. *Kessler v. Eldred*, *supra*. [206 U. S. 285, 27 S. Ct. 611, 51 L. Ed. 1065].”

Conclusion.

Appellee respectfully submits that the United States District Court properly sustained appellee's motion to dismiss for Lack of Jurisdiction Over the Subject Matter. Upon the record and for the reasons hereinabove stated, appellee requests that the District Court's Judgment of Dismissal for Lack of Jurisdiction Over the Subject Matter be affirmed.

Respectfully submitted,

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No. 15835.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FERNIER,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF
CALIFORNIA,

Appellee.

Petition to Review a Decision of the United States District
Court.

APPELLANT'S OPENING BRIEF.

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FILED

FEB 25 1958

PAUL P. O'BRIEN, Clerk

TOPICAL INDEX

	PAGE
Statement of the case.....	1
Jurisdiction	2
Statement of facts.....	2
Specification of error.....	6
Questions presented by appellant.....	6
Argument.....	7
I.	
Does a conviction based on a plea of nolo contendere carry with it any civil penalties?.....	7
II.	
Is a 1951 amendment allegedly making a conviction of a felony, without moral turpitude, a ground for disciplinary action against a physician and surgeon under Section 2383 of the California Business and Professions Code an ex post facto law where applied to an act committed prior to 1951?	8
III.	
Has the State Board of Medical Examiners committed an intrusion into the processes of the federal court by attach- ing a penalty to a conviction based on a plea of nolo con- tendere, on which the federal court may act?.....	10
IV.	
Is a conviction of a felony, not involving moral turpitude, based on a plea of nolo contendere, a ground for disciplin- ary action against a physician and surgeon under Section 2383 of the California Business and Professions Code?.....	13
V.	
Was it an abuse of discretion to suspend the appellant for one year?	17
Conclusion	18

TABLE OF AUTHORITIES CITED

CASES	PAGE
Automatic Dialing Corporation v. Maritime Quality Hardware Company, 78 Fed. Supp. 558.....	12
Benson Hotel Corporation v. Woods, 168 F. 2d 694.....	12
Commonwealth v. Lewis, 253 Pa. 171.....	11
Cooper v. State Board of Health, 102 Cal. App. 2d 906.....	17
Corica v. Ragen, 140 F. 2d 496.....	12
Florida Guaranteed Securities v. McAllister, 47 F. 2d 762.....	11
Fuller v. McCauley, 93 F. 2d 1004.....	9
Garner v. Board of Public Works, City of Los Angeles, 341 U. S. 716, 95 L. Ed. 1317.....	10
Hall v. People of the State of California, 79 F. 2d 132.....	9
Hallinan, In re, 43 Cal. 2d 243.....	7, 15, 16, 17
Mickler v. Fahs, 243 F. 2d 515.....	7
Milliken v. McCauley, 25 Fed. Supp. 202, 93 F. 2d 645.....	9
Sautter v. Contractors State License Board, 124 Cal. App. 2d 149	17
Security Trust & Savings Bank v. Southern Pacific, 6 Cal. App. 2d 581, 45 P. 2d 268.....	11
Steinberg v. American Bantam Car Company, 76 Fed. Supp. 426	12
Tucker v. United States, 196 F. 2d 260.....	7
United States v. Cold Metal Process Company, 57 Fed. Supp. 317	12
United States v. Forino & Garfinkel, 59 Fed. Supp. 846, 166 F. 2d 887.....	10
United States v. Lair, 195 Fed. 47.....	7
United States v. One Chevrolet, 91 Fed. Supp. 272.....	7
United States v. Standard Ultramarine and Color Co., 137 Fed. Supp. 167.....	7
United States ex rel. Oliver S. Smith v. J. Vernal Jackson, 234 F. 2d 742.....	11

STATUTES

PAGE

Business and Professions Code, Sec. 2383.....	4, 5, 6, 8, 9, 13, 14
Business and Professions Code, Sec. 6101.....	14
United States Code, Title 26, Sec. 145(b).....	2
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 2283.....	11
United States Constitution, Art. I, Sec. 10.....	9
United States Constitution, Fourteenth Amendment	9

No. 15835.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF
CALIFORNIA,

Appellee,

Petition to Review a Decision of the United States District
Court.

APPELLANT'S OPENING BRIEF.

Statement of the Case.

This is an appeal from an order made by the United States District Court dissolving a temporary restraining order and judgment of dismissal for lack of jurisdiction over the subject matter. [Tr. of Rec. p. 23.]

Appellant filed a complaint in the United States District Court, Southern District of California, Central Division, No. 1305-57-T, against The Board of Medical Examiners of the State of California, seeking declaratory relief and injunction to restrain the Board from suspending the appellant from the practice of medicine in the State of California for one year, and to declare the rights of the petitioner. [Tr. of Rec. pp. 3-17.]

That the Honorable Ernest A. Tolin, United States District Judge, issued an order to show cause and tem-

porary restraining order, restraining the Board from suspending the appellant pending the hearing of the order to show cause. [Tr. of Rec. pp. 17-18.]

That on motion of the appellee the District Court ordered the complaint dismissed for lack of jurisdiction. [Tr. of Rec. pp. 19-20; 22-23.]

On motion of the appellant the District Court restored and granted an injunction during the pendency of this appeal, enjoining and restraining the Board from enforcing the order suspending the appellant from practicing medicine and surgery in the State of California. [Tr. of Rec. pp. 20-21.]

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291. The pleading relied on is the Complaint. [Tr. of Rec. pp. 3-17.]

Statement of Facts.

Appellant, a practicing physician and surgeon for the past twenty years, licensed by the State of California [Tr. of Rec. p. 3], was convicted on a plea of *nolo contendere* in the United States District Court for the Southern District of California, Central Division, of two counts of violating Title 26, United States Code, Section 145(b), charging that he attempted to defeat and evade income taxes for the years 1947 and 1948. [Tr. of Rec. pp. 4-5.]

Federal Judge Leon Yankwich pronounced the judgment, and at the time of doing so stated:

“This case is different from the usual one involving a physician. Many a time a physician involved in income tax difficulties is one who resorts to un-

ethical practices, and who then tries to cover them up by covering up his income tax. In this particular case there is no such thing. There is no income indicated from any improper sources. This is really the case of a person who has become involved because of his lack of experience in financial matters and his failure to surround himself with persons who, while he is carrying on his work, would watch his finances and see that proper report is made. This is a very voluminous file here which has been built up by the many letters sent in, which I have in front of me. Some are of a confidential nature and I will not have them filed, but will return them to the probation officer.

“I think the man’s past life is not such that probation would be necessary. I think a substantial fine will serve the ends of justice in this particular case, and allow this man to go on: I think, on a plea of *nolo contendere* they do not consider—at least, the Medical Board does not consider that as a ground for revoking his license, and unless they have professional grounds, certainly his license should not be revoked for this particular offense. I am sure it would be revoked if I imposed any sentence other than a fine, although, technically speaking, a plea of *nolo contendere* does not carry with it any of the civil penalties.” [Tr. of Rec. pp. 5-6.]

Thereafter The Board of Medical Examiners of the State of California on or about November 10, 1955, made an order directing that appellant be suspended for a period of one year from the practice of medicine and surgery in the State of California, which order was based on the convictions on the pleas of *nolo contendere* hereinabove referred to. [Tr. of Rec. pp. 3-4.]

That the order of suspension was made after the Board's Hearing Officer proposed that a suspension of one year be stayed, and appellant placed on probation for a period of three years. The recommendation of the Hearing Officer was overruled by the Board. [Tr. of Rec. p. 4.]

That at the time the offenses were alleged to have been committed, namely, income tax evasion for the years 1947 and 1948, Section 2383 of the California Business and Professions Code provided as follows:

"Sec. 2383. Conviction of felony or offense involving moral turpitude: Evidence. The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct." [Tr. of Rec. p. 9.]

That said Section 2383 of the California Business and Professions Code was amended in 1951 to read as follows:

"Sec. 2383. Conviction of felony or offense involving moral turpitude; record as evidence: What deemed conviction: Authority of Board after order under Pen. C. Sec. 1203.4. The conviction of a felony, or of an offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The Board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or

when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code, allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty or dismissing the accusation, information or indictment.” [Tr. of Rec. p. 8.]

That appellant entered his pleas of *nolo contendere* to said income tax charges after Section 2383 of the California Business and Professions Code was amended.

That the substantial changes in Section 2383 as enacted in 1951, insofar as they relate to the appellant, are:

That after the words, “the conviction of a felony” a comma was inserted, so that the statute, as amended in 1951, read:

“The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter * * *”

And there was added:

“A plea or verdict of guilty or a conviction following a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section * * *” [Tr. of Rec. p. 9.]

That the appellant exhausted all of his remedies available to him in the State Courts of California, and certiorari was denied by the United States Supreme Court when appellant sought to review the decision of the State Court dismissing appellant’s petition for writ of mandate to set aside the decision of The Board of Medical Examiners. [Tr. of Rec. pp. 12-13.]

The Board of Medical Examiners has stipulated that it did not seek to discipline the appellant for the conviction of an offense involving moral turpitude. (Stip.)

Specification of Error.

The Court Erred in granting defendant's motion to dismiss complaint for lack of jurisdiction.

Questions Presented by Appellant.

I.

Does a conviction based on a plea of *nolo contendere* carry with it any civil penalties?

II.

Is a 1951 amendment allegedly making a conviction of a felony, without moral turpitude, a ground for disciplinary action against a physician and surgeon under Section 2383 of the California Business and Professions Code an *ex post facto* law where applied to an act committed prior to 1951?

III.

Has The State Board of Medical Examiners committed an intrusion into the processes of the Federal Court by attaching a penalty to a conviction based on a plea of *nolo contendere*, on which the Federal Court may act?

IV.

Is a conviction of a felony, not involving moral turpitude, based on a plea of *nolo contendere*, a ground for disciplinary action against a physician and surgeon under Section 2383 of the California Business and Professions Code?

V.

Was it an abuse of discretion to suspend the appellant for one year?

ARGUMENT.

I.

Does a Conviction Based on a Plea of *Nolo Contendere* Carry With It Any Civil Penalties?

In the case of *In re Hallinan*, 43 Cal. 2d 243, the Supreme Court of California said on page 250:

“Since Section 145, Subdivision (b), is a United States Statute, we must accept the interpretation given it by the United States Courts.”

The State Medical Board is relying on a plea of *nolo contendere* to a Federal statute in seeking to discipline Dr. Furnish. It therefore must depend on the Federal statute and Federal procedure.

A plea of *nolo contendere* is not open to the accused in all criminal prosecutions, and is allowable only under leave and acceptance by the Court. It is equivalent to a plea of guilty for the purposes of the case only, but is distinguishable in that it cannot be used against the defendant as an admission in any civil suit for the same act.

Tucker v. United States, 196 F. 2d 260 (C. C. A. 7th);

United States v. Standard Ultramarine and Color Co., 137 Fed. Supp. 167 (D. C. N. Y.).

A conviction based on a plea of *nolo contendere* cannot be used in any other case.

Mickler v. Fahs, 243 F. 2d 515 (C. C. A. 5th);

United States v. Lair, 195 Fed. 47 (C. C. A. 8th).

A plea of *nolo contendere* cannot be considered in disposing of issues in a civil action.

United States v. One Chevrolet, 91 Fed. Supp. 272.

It should be noted that the learned trial judge at the time of imposing sentence stated “. . . unless they have professional grounds, certainly his license should not be revoked for this particular offense . . . technically speaking a plea of *nolo contendere* does not carry with it any of the civil penalties.” [Tr. of Rec. p. 6.]

II.

Is a 1951 Amendment Allegedly Making a Conviction of a Felony, Without Moral Turpitude, a Ground for Disciplinary Action Against a Physician and Surgeon Under Section 2383 of the California Business and Professions Code an Ex Post Facto Law Where Applied to an Act Committed Prior to 1951?

The 1951 Amendment allegedly making a conviction of a felony, without moral turpitude, ground for disciplinary action against a physician and surgeon under Section 2383 of the Business and Professions Code is an *ex post facto* law where applied to an act committed prior to 1951.

The offenses to which the plaintiff entered a plea of *nolo contendere* in the Federal Court involved income taxes for the years 1947 and 1948, with the returns for those years having been filed in 1948 and 1949.

At the time the tax returns were filed Section 2383 of the Business and Professions Code provided:

“The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct.” It should be noted that there was no comma after the word “felony” in 1948 and 1949.

The comma was inserted after the word "felony" in Section 2383 of the Business and Professions Code in 1951.

Therefore the Board of Medical Examiners has applied to your appellant the law as enacted in 1951, rather than the law as it was in 1947-1949.

Article 1, Section 10, of the United States Constitution, provides that no state shall "pass any bill of attainder or ex post facto law." The application of such an ex post facto law amounts to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

An ex post facto law within constitutional prohibition against the enactment of ex post facto laws, is one which makes a crime of an act which when committed was not a crime, or a law which increases the punishment for an act already committed. It has also been held that an ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. It has been said the standard of determination in considering whether a given statute is ex post facto arises out of a comparison of the laws themselves and the rights which they confer or the obligations they impose.

Milliken v. McCauley, 25 Fed. Supp. 202, 93 F. 2d 645;

Fuller v. McCauley, 93 F. 2d 1004;

Hall v. People of the State of California, 79 F. 2d 132.

It has been said an ordinance is *ex post facto* if it imposes punishment for past conduct lawful at the time it was engaged in.

Garner v. Board of Public Works, City of Los Angeles, 341 U. S. 716, 95 L. Ed. 1317.

An *ex post facto* law is one which renders a previously innocent action criminal, aggravates or increases the punishment, penalizes an innocent act while assuming to regulate civil rights and remedies, and deprives an accused of some protection or defense previously available, or alters his situation to his disadvantage.

United States v. Forino & Garfinkel, 59 Fed. Supp. 846, 166 F. 2d 887.

III.

Has the State Board of Medical Examiners Committed an Intrusion Into the Processes of the Federal Court by Attaching a Penalty to a Conviction Based on a Plea of *Nolo Contendere*, on Which the Federal Court May Act?

The Federal Court in passing judgment on the appellant at the time his criminal income tax case was disposed of found that his license should not be revoked for the particular offense; it also found that the plea of *nolo contendere* did not carry any civil penalties. [Tr. of Rec. p. 6.] The Court could not have used a stronger language in endeavoring to protect appellant's right to practice medicine.

Notwithstanding this action by the Federal Court, The State Board of Medical Examiners suspended the appellant's license to practice medicine because of the convictions based on the pleas of *nolo contendere*.

It is the generally accepted rule that every Court has inherent power to enforce its judgments and decrees.

Florida Guaranteed Securities v. McAllister, 47 F. 2d 762.

The Court may make such orders and issue such process as may be necessary to render the Court's judgments and decrees effective, and this power is not affected by the fact that the decree is final.

Security Trust & Savings Bank v. Southern Pacific, 6 Cal. App. 2d 581, 45 P. 2d 268, 270.

The power to enforce their decrees is necessarily incident to the jurisdiction of Courts.

Commonwealth v. Lewis, 253 Pa. 171.

The Federal Court may stay proceedings in a State tribunal where necessary to protect or effectuate its judgment.

28 U. S. Code, Sec. 2283.

Where the defendant had pursued and exhausted his state remedies, resort to the Federal District Court was appropriate.

United States of America ex. rel. Oliver S. Smith v. J. Vernal Jackson, 234 F. 2d 742 (C. C. A. 2d).

An interlocutory injunction or temporary restraining order is preliminary to a hearing on the merits, the purpose of which is to prevent a threatened wrong or any further perpetration or injury or the doing of any act pending the final determination of the action whereby rights may be threatened or endangered, and to maintain things in the condition in which they are in at the time,

and thus to protect property rights from further complication or injury until the issues can be determined after a full hearing.

Benson Hotel Corporation v. Woods, 168 F. 2d 694.

The province of a preliminary injunction is to preserve *pendente lite* the last actual peaceable non-contested status preceding a controversy.

Steinberg v. American Bantam Car Company, 76 Fed. Supp. 426;

Automatic Dialing Corporation v. Maritime Quality Hardware Company, 78 Fed. Supp. 558.

A court of equity may, in its discretion, grant an injunction, but a court of equity must exercise its discretion in such a manner as to safeguard the interest of both parties.

Corica v. Ragen, 140 F. 2d 496;

United States v. Cold Metal Process Company, 57 Fed. Supp. 317.

It should be noted that the dismissal of the action in the District Court was based solely on a belief by the trial court that it did not have jurisdiction over the subject matter; and the order dissolving the temporary restraining order was not based on discretion, but strictly on the question of jurisdiction. [Tr. of Rec. pp. 36, 38, 22-23.]

IV.

Is a Conviction of a Felony, Not Involving Moral Turpitude, Based on a Plea of *Nolo Contendere*, a Ground for Disciplinary Action Against a Physician and Surgeon Under Section 2383 of the California Business and Professions Code?

A conviction of a felony, not involving moral turpitude based on a plea of *nolo contendere*, is not ground for disciplinary action against a physician and surgeon under Section 2383 of the Business and Professions Code.

Section 2383 of the Business and Professions Code originally provided in effect that the conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct subjecting a physician and surgeon to disciplinary action.

In 1951, Section 2383 of the Business and Professions Code was amended to provide that a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of the section providing for disciplinary action. At the time this amendment was enacted a comma was placed after the word "felony" in the first portion of the section so that it now reads: "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct."

It is significant, however, that in the amendment providing that a plea of *nolo contendere* shall be deemed to be a conviction, a comma was not placed after the word "felony."

Therefore, assuming for the sake of discussion that the Legislature had in mind that a conviction of a felony not

involving moral turpitude should be a ground for disciplinary action, it is clear the Legislature did not have in mind that a plea of nolo contendere to a felony not involving moral turpitude would come within the class of cases subjecting a physician and surgeon to disciplinary action.

It should be noted that Section 6101 of the Business and Professions Code provides that a conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension of an attorney at law.

When Section 6101 of the Business and Professions Code was amended to provide that a plea of *nolo contendere* would be deemed to be a conviction the same as in Section 2383 of the Business and Professions Code, the Legislature did not insert a comma after the word "felony" in the first portion of Section 6101 of the Business and Professions Code to make a conviction of a felony not involving moral turpitude, a ground for disciplinary action.

The Board of Medical Examiners, is faced with two horns of a dilemma: *Either an inadvertent error was made by the Legislature in inserting a comma after the word "felony" in the first portion of Section 2383 of the Business and Professions Code, since it did not see fit to do so in the case of an attorney at law, nor in the portion dealing with a plea of nolo contendere to a felony; or if the Legislature intended to make mere conviction of a felony in the case of a physician and surgeon ground for disciplinary action, then to be consistent we must come to the inescapable conclusion that the Legislature intended that in the case of a plea of nolo contendere it would be*

necessary that the felony involve moral turpitude in order to be deemed a conviction for the purpose of disciplinary action.

The Supreme Court of California has specifically held, relating to lawyers, that a conviction of a felony is insufficient to justify disciplinary action unless there is a showing of moral turpitude.

In re Hallinan, 43 Cal. 2d 243.

The Supreme Court held in the Hallinan case that a nolo contendere plea is not equivalent to a plea of guilty, and that moral turpitude must be inherent in the commission of the offense to warrant disbarment. The Court said on page 247:

“ . . . In view of *Caminetti v. Imperial Mutual L. Ins. Co.*, 59 Cal. App. 2d 476, 490-492 (139 P. 2d 681), holding that a plea of nolo contendere is not the equivalent of a plea of guilty and cannot be used in another proceeding as an admission against the person so pleading, the State Bar was justified in concluding that such a plea was not the equivalent of a ‘plea or verdict of guilty’ within the meaning of Section 6101 of the Business and Professions Code.” (Emphasis ours.)

And again on page 248, the Court said:

“ . . . Moral turpitude must be inherent in the commission of the crime itself to warrant summary disbarment under those sections. As we said in *re Rothrock*, 16 Cal. 2d 449, 454 (106 P. 2d 907; 131 A. L. R. 226), an ‘attorney’s name will not be stricken from the rolls where the nature of the particular crime does not reflect a bad moral character with respect to the duties of the attorney’s

profession.’ (See in re *McAllister*, Supra, 14 Cal. 2d 602, 603-604) (8). The language of the statute itself clearly indicates that an attorney can be summarily disbarred only when the crime of which he was convicted involves moral turpitude. Even if it is assumed that statements in the indictment or judgment of conviction describing conduct that goes beyond the essential elements of the crime charged are a part of the ‘record of conviction,’ as the State Bar contends, the record of conviction is ‘conclusive evidence’ only when the crime itself necessarily involves moral turpitude.” (Emphasis ours.)

An on page 250, the Court said:

“The crucial question in the present proceeding, therefore, is whether or not an intent to defraud the United States is an essential element of the crime proscribed by Section 145, subdivision (b) of the Internal Revenue Code. If an intent to defraud is not an essential element and a person may be convicted thereunder, without proof of that intent or other conduct evidencing moral turpitude, an attorney convicted of that crime cannot be summarily disbarred. (13) Since Section 145, subdivision (b) is a United States statute, we must accept the interpretation given it by the United States courts.”

After analyzing the various cases in the United States courts, the Court, in the *Hallinan* case, continued on page 252:

“The foregoing cases establish that fraud is not an essential element of the offense proscribed by Section 145, subdivision (b), that some measure of bad faith or evil intent is an essential element, but such bad faith or evil intent, which can be inferred from evidence that the defendant acted without justi-

fiable excuse, without ground for believing his acts were lawful, or in careless disregard of the lawfulness of his acts does not necessarily involve moral turpitude.”

In re Hallinan, 43 Cal. 2d 243.

We urge that it is difficult to understand how the Legislature could have meant one treatment for a lawyer and another for a doctor. It would be discriminatory to say the least.

V.

Was It an Abuse of Discretion to Suspend the Appellant for One Year?

The punishment imposed by the decision of the Board of Medical Examiners, to-wit, suspension from the practice of medicine for one year, was so overly severe and unwarranted by the evidence as to constitute a prejudicial abuse of discretion.

It has been held that where the order or decision of an administrative agency is so severe it must be clearly supported by the findings, and the findings clearly supported by the weight of the evidence, or a prejudicial abuse of discretion has taken place.

Cooper v. State Board of Health (1951), 102 Cal. App. 2d 906;

Sautter v. Contractors State License Board (1954), 124 Cal. App. 2d 149.

We have here the case of a distinguished physician and surgeon who has been practicing medicine for the past twenty years and who maintains an office at 5718 Hollywood Boulevard, Los Angeles, California. A voluminous file was built up by the many letters sent to the Court

and considered by Judge Yankwich. To suspend such a man from practice for one year will destroy his reputation as a medical practitioner in the community, and will deprive his patients of his services during the period of suspension.

In view of all of the circumstances of this case, it clearly appears that this is not the type of case where a physician and surgeon should be deprived of his right to practice medicine, and it would be against the public interest to permit such a harsh penalty to be imposed where no moral turpitude was involved.

Conclusion.

The Federal Court is entitled to protect its finding that the case of Dr. Furnish does not warrant a suspension from the practice of medicine and that the pleas of *nolo contendere* do not carry any civil penalties.

The effort on the part of The Board of Medical Examiners to suspend the appellant from practicing medicine is unwarranted when viewed in the light that the Board is endeavoring to punish the Doctor on the basis of a 1951 amendment being applied to acts committed in 1948 and 1949.

The suspension of a doctor from the practice of medicine is a most serious matter. Therefore, the statute on which the suspension is based should be strictly construed. Even taking the 1951 amendment at its face value, we find that in the case of a plea of *nolo contendere* a showing of moral turpitude is required. The Board agrees that there is no showing of moral turpitude in this case.

Accordingly, it is respectfully submitted that the decision of the District Court should be reversed and the matter proceed to trial on its merits.

Respectfully submitted,

MURRAY M. CHOTINER and

RUSSELL E. PARSONS,

By MURRAY M. CHOTINER,

Attorneys for Appellant.

No. 15835.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF
CALIFORNIA,

Appellee,

Petition to Review a Decision of the United States District
Court.

APPELLANT'S REPLY BRIEF.

MURRAY M. CHOTINER and

RUSSELL E. PARSONS,

Suite 600,
202 South Hamilton Drive,
Beverly Hills, California,

Attorneys for Appellant.

FILED

MAY 30 1958

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Jurisdiction	1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Browder v. City of Montgomery, 146 Fed. Supp. 127.....	2
City of Fresno v. Edmonston, 131 Fed. Supp. 421.....	2
Keegan v. State of New Jersey, 42 Fed. Supp. 922.....	3
Louisiana Railroad Commission v. Texas, etc. R.R. Co., 144 Fed. 68	2
Norwood v. Parenteau, 228 F. 2d 148.....	3
O. D. Jennings & Co. v. Buterbaugh, 89 Fed. Supp. 553.....	3
R. F. C. v. Jacksonville BlowPipe Co., 244 F. 2d 394.....	3

STATUTES

United States Code, Title 28, Sec. 1651.....	1
United States Code, Title 28, Sec. 2201.....	1
United States Code, Title 28, Sec. 2283.....	2

No. 15835.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF
CALIFORNIA,

Appellee,

APPELLANT'S CLOSING BRIEF.

Jurisdiction.

Appellee's primary contention is that the United States District Court does not have jurisdiction over the subject matter.

However, Section 1651, Title 28, *United States Code*, provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. . . ."

Section 2201, Title 28, *United States Code*, provides:

"In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration. . . ."

Section 2283, Title 28, *United States Code*, provides:

“A court of the United States may not grant an injunction to stay proceedings in a State Court EXCEPT as expressly authorized by Act of Congress, OR WHERE NECESSARY IN AID OF ITS JURISDICTION OR TO PROTECT OR EFFECTUATE ITS JUDGMENTS.” (Emphasis added.)

The instant action seeks to declare the rights of the appellant and to restrain an administrative State Board; it does not seek to restrain a State court primarily. Therefore, the instant action does not come within the prohibition preventing a Federal court from granting injunctive relief.

A Federal court is not prohibited from restraining and enjoining conduct of administrative proceedings before State bodies or by State bodies.

City of Fresno v. Edmonston, 131 Fed. Supp. 421, 424, 425 (D. C. Cal., 1955).

A Federal Court may restrain State Commissions which are not courts.

Louisiana Railroad Commission v. Texas, etc. R.R. Co., 144 Fed. 68, 72.

In any event, the Federal court under Section 2283 of Title 28, *United States Code*, can act to protect or effectuate its judgments.

The Federal court had authority to enjoin filing or prosecution of action in State courts by a City and its Board of Commissioners, and grant relief prayed for if circumstances were found to so justify.

Browder v. City of Montgomery, 146 Fed. Supp. 127, 129 D. C. Ala., 1956).

An injunction may be issued by a Federal court to restrain State proceeding seeking to interfere with property in the custody of the Federal Court.

O. D. Jennings & Co. v. Buterbaugh, 89 Fed. Supp. 553, 556 (D. C. Pa.).

In the instant case, we do not have property in the custody of the Federal Court, but we do have an appellant who entered a plea of *nolo contendere* in a Federal action, and was subjected to the jurisdiction of the Federal Court.

The United States District Court had authority to stay proceedings in a State court in aid of its jurisdiction and to protect and effectuate its judgment in a bankruptcy case.

R. F. C. v. Jacksonville BlowPipe Co., 244 F. 2d 394, 398.

A Federal court can exercise jurisdiction to prevent the trial of a defendant by a State court where the trial would invade constitutional rights, and such jurisdiction can be exercised by way of injunction.

Keegan v. State of New Jersey, 42 Fed. Supp. 922, 924 (D. C. N. J., 1941).

The cases cited by appellee in its brief refer in the main to sets of facts dealing with State actions. For example, the case of *Norwood v. Parenteau*, 228 F. 2d 148, cited on pages 12 and 13 of appellee's brief, refers to an optometrist who was found guilty of unprofessional advertising, in violation of the rules of the South Dakota State Board of Examiners in Optometry.

The primary distinction between the cases cited by appellee and the instant case is that appellee's citations refer to initial State actions, or an attempt by individuals to re-

litigate State actions, whereas appellant's case is one involving a controversy over the appellant's rights under a plea of *nolo contendere* in a Federal action; the State Board of Medical Examiners and the California State statute seek to use the *nolo contendere* plea in a State proceeding, which is separate and distinct from the Federal criminal action where the *nolo* plea was entered.

It is well settled, as pointed out in appellant's Opening Brief, pages 7-8, that a plea of *nolo contendere* cannot be used in any other case. The appellee seeks to use the *nolo* plea as the basis for its action suspending the appellant from the practice of medicine, even though no moral turpitude was involved. (Stip.)

The State Board of Medical Examiners has challenged the decisions holding that a plea of *nolo contendere* cannot be used in any other case; appellee has challenged the Federal court's action in permitting a *nolo* plea to be entered by the appellant, and has challenged the finding of the Federal District Judge that a plea of *nolo contendere* does not carry with it any civil penalties. [Tr. of R. pp. 5-6.]

Appellant is not seeking to have the Federal court re-litigate the litigation of the State courts. The appellant does seek to determine whether the Federal court can enjoin an administrative State body from using a *nolo* plea for the purpose of suspending a medical doctor from the practice of medicine.

It should be noted that the action involving the appellant in the Federal court preceded the action taken by the State Board.

It is respectfully submitted that this is a case where the Federal court has jurisdiction to decide the action on its

merits and to determine if the circumstances are such as to justify enjoining the State Board of Medical Examiners from suspending the appellant from the practice of medicine. To hold otherwise would mean that a *nolo* plea does carry civil penalties and that a State statute may so provide.

Accordingly, it is respectfully submitted that the decision of the District Court should be reversed and it should exercise its jurisdiction and permit the matter to proceed to trial on its merits.

Respectfully submitted,

MURRAY M. CHOTINER and
RUSSELL E. PARSONS,

By MURRAY M. CHOTINER,
Attorneys for Appellant.

No. 15835

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF
CALIFORNIA,

Appellee.

PETITION FOR REHEARING.

MURRAY M. CHOTINER, and
RUSSELL E. PARSONS,
202 South Hamilton Drive,
Beverly Hills, California,
Attorneys for Appellant.

FILED

JUL 18 1958

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

PAGE

I.

Substantial legal issues raised by appellant were not considered, or were overlooked, by the court.....	1
Conclusion	5

TABLE OF AUTHORITIES CITED

CASES	PAGE
City of Fresno v. Edmonston, 131 Fed. Supp. 421.....	2
Louisiana Railroad Commission v. Texas, etc. R.R. Co., 144 Fed. 68	2
Mickler v. Fahs, 243 F. 2d 515.....	3
Tucker v. United States, 196 Fed. 260.....	3
United States v. Lair, 195 Fed. 47.....	3
United States v. One Chevrolet, 91 Fed. Supp. 272.....	3
United States v. Standard Ultramarine and Color Co., 137 Fed. Supp. 167	3
STATUTES	
Business and Professions Code, Sec. 2383.....	4
United States Code, Title 28, Sec. 2201.....	2
United States Code, Title 28, Sec. 2283.....	1

No. 15835
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF
CALIFORNIA,

Appellee.

PETITION FOR REHEARING.

I.

**Substantial Legal Issues Raised by Appellant Were
Not Considered, or Were Overlooked, by the
Court.**

The Court in its Opinion (p. 4) held that The Board of Medical Examiners was a party litigant and that the restriction of the United States Code (28 U. S. C., Section 2283) cannot be avoided by seeking to enjoin a litigant rather than the State Court itself.

However, the Court apparently has overlooked the authorities set forth by appellant in his reply brief (pp. 2-3) to the effect that a State body may be restrained.

Appellant respectfully submits that this is an action to declare the rights of appellant and to restrain an administrative State Board; he does not seek to restrain a State Court.

A Federal Court is not prohibited from restraining and enjoining conduct of administrative proceedings before State bodies or by State bodies.

City of Fresno v. Edmonston (D. C. Cal., 1955),
131 Fed. Supp. 421, 424, 425.

A Federal Court may restrain State Commissions which are not Courts.

Louisiana Railroad Commission v. Texas, etc. R.R. Co., 144 Fed. 68, 72.

The Court in its opinion (pp. 4-5) considered the contention of appellant that the District Court has jurisdiction, since it may take action to protect or effectuate its judgment. But then the Court, while stating that appellant's statement in his Opening Brief that the District Court found that the plea of *nolo contendere* did not carry any civil penalties cannot be criticized if the word "found" is used in its non-legal sense; still the Court held that in its legal sense there was no finding that a plea of *nolo contendere* does not carry any civil penalties.

It is submitted by appellant that the District Court has jurisdiction to determine the rights of the parties under Section 2201, Title 28, *United States Code*, which provides that in a case of an actual controversy within its jurisdiction any Court of the United States may declare the rights and other legal relations of any interested party seeking such a declaration.

In the instant case there is an actual controversy within the jurisdiction of the District Court for the Southern District of California, Central Division. The appellant contends that his rights were violated when The State Board of Medical Examiners used a conviction under a plea of *nolo contendere* of a charge pending in the United

States District Court for the purpose of suspending him from the practice of medicine. Whether appellant is correct in his contention is a matter to be determined on its merits by the Trial Court. Here we have a situation where no opportunity is being given the appellant to have the issue determined on its merits.

The Federal Courts have held that a conviction based on a plea of *nolo contendere* cannot be used in any other case; cannot be considered in disposing of issues in a civil action, and that it cannot be used as an admission in any civil suit for the same act.

Mickler v. Fahs (C. C. A. 5th), 243 F. 2d 515, 517;

United States v. Lair (C. C. A. 8th), 195 Fed. 47, 52;

United States v. One Chevrolet, 91 Fed. Supp. 272, 275;

Tucker v. United States (C. C. A. 7th), 196 Fed. 260, 262;

United States v. Standard Ultramarine and Color Co. (D. C. N. Y.), 137 Fed. Supp. 167, 170.

Appellant contends that a sense of justice and fair play requires that he be given the opportunity to have a Trial Court determine whether in equity there was a finding by the Federal District Judge that a plea of *nolo contendere* does not carry with it any civil penalties. For if the contention of appellant is correct that in equity there was such a finding, then the District Court has the right to protect or effectuate its judgment in this case.

The Court in its Opinion (p. 6) holds that The Board of Medical Examiners did what the Federal District Judge anticipated the Board would not do, to-wit, suspend the license of the appellant because of a conviction follow-

ing a plea of *nolo contendere* made to a charge of a felony.

What has been completely overlooked is that the first portion of Section 2383 of the *California Business and Professions Code* refers to

“The conviction of a felony, or of an offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct.”

The significant thing is that the section goes on to read

“A plea or verdict of guilty or a conviction following a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section.”

It should be noted that where there is a comma after the word “felony” in the first portion of the section, when talking about the conviction of a felony or of an offense involving moral turpitude that there is no comma after the word “felony” when the section speaks of using a conviction following a plea of *nolo contendere*. Therefore it is necessary that there be a showing of moral turpitude where a plea of *nolo contendere* is used as the basis of a conviction. This is reasonable and logical because there is a distinction between a plea of *nolo contendere* and a plea or verdict of guilty. The plea of *nolo contendere* admits the facts but denies the criminal intent. In the present case, there is a stipulation on file that the Board in its action against Dr. Furnish “did not seek to discipline the said appellant for the conviction of an offense involving moral turpitude.”

The Court in its Opinion (p. 7) stated that the Court held the constitutional proscription against *ex post facto* laws was no bar to the disciplinary action.

It is submitted that under the authorities cited by appellant in his opening brief (pp. 8-10) clearly indicate that an *ex post facto* law was used to suspend Dr. Furnish from the practice of medicine.

Conclusion.

Wherefore, appellant urges that this Petition for Rehearing be granted so that the authorities presented by appellant and his position may be reconsidered to the end that the District Court should proceed with a hearing on the merits of the case rather than deny Dr. Furnish an opportunity of having his rights declared and determined.

Respectfully submitted,

MURRAY M. CHOTINER, and
RUSSELL E. PARSONS,

By MURRAY M. CHOTINER,
Attorneys for Appellant.

Certificate of Counsel.

Murray M. Chotiner, one of counsel for appellant, hereby certifies that in his judgment the within Petition for Rehearing is well founded and is not interposed for delay.

MURRAY M. CHOTINER.

No. 15850 ✓

United States
Court of Appeals
for the Ninth Circuit

COLE INVESTMENT CO., a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Northern Division.

FILED

MAR 12 1958

PAUL P. O'BRIEN, CLERK

No. 15850

**United States
Court of Appeals
for the Ninth Circuit**

COLE INVESTMENT CO., a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Northern Division.**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of.....	1
Certificate by Clerk.....	24
Findings of Fact, Conclusions of Law and Judgment	16
Notice of Appeal.....	22
Notice of Filing of Action.....	3
Schedule of Witnesses.....	25
Statement as to Just Compensation.....	12

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RICHARD J. DAUBER,
Assistant U. S. Attorney,
821 Federal Building,
Los Angeles 12, California.

United States District Court, Southern District
of California, Northern Division

No. 1449-ND Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

20,007.29 ACRES OF LAND, more or Less, and
A CERTAIN UNPATENTED MINING
CLAIM, in the County of Kern, State of
California; MARGARET CLASSELLS WIL-
SON, et al., and UNKNOWN OWNERS,

Defendants.

NOTICE OF FILING OF ACTION

To the Defendants Named in Schedule "B" At-
tached Hereto and Made a Part Hereof and to
Unknown owners:

You and Each of You Are Hereby Notified that
a Complaint in Condemnation has been filed in the
office of the Clerk of the above-entitled court in
an action to condemn the fee simple title to Tracts
Nos. F-1103, F-1106, F-1107, F-1120, F-1121,
F-1128, F-1132, F-1164, F-1165, G-1200, G-1201,
G-1202, G-1203, G-1209, G-1210, G-1213, G-1214,
G-1215, G-1216, G-1217, G-1218, G-1221, G-1222,
G-1224, G-1226, G-1231, G-1238, H-1305, H-1312,
H-1315, H-1344, J-1402, J-1403, J-1406, J-1407,
J-1423, J-1424, J-1426, J-1432, J-1437, J-1438,
J-1441, J-1444, J-1445, J-1447, J-1450, J-1454.

J-1461, K-1515, K-1516, K-1523, K-1528, K-1530, K-1543, K-1548, K-1563, K-1577, K-1578, [2*] W-3000, FF-3903, FF-3910, FF-3913, FF-3914, FF-3922, FF-3924, FF-3926, FF-3928, FF-3929, and FF-3933, subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipe lines; and

As to Tract L-1-M, all outstanding right, title, and interest of any and all persons claiming any interest whatsoever for mining claims in said tract, subject to existing easements for public roads and highways, public utilities, railroads, and pipe lines, described in Schedule "A" attached hereto and made a part hereof, for public use for the expanding needs and requirements of the Department of the Air Force and other military uses incident thereto.

The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518, 50 U.S.C. 171), which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610,

***Page numbering appearing at foot of page of original *Certified Transcript of Record*.**

611; 10 U.S.C. 1343a, b, and c), which Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947, approved July 26, 1947 (61 Stat. 495); the Acts of Congress approved June 17, 1950 and January 6, 1951 (Public Laws 564 and 910, 81st Congress), and the Act of Congress approved September 28, 1951 (Public Law 155, 82nd Congress), which acts authorize acquisition of the land, and the Acts of Congress approved September 6, 1950 and January 6, 1951 (Public Laws 759 and 911, 81st Congress), and the Act of Congress approved November 1, 1951 (Public Law 254, 82nd Congress), which acts appropriated [3] funds for such purposes.

You Are Further Notified that if you have any objection or defense to the taking of your property, you are required to serve upon plaintiff's attorneys at the address designated herein within twenty (20) days after personal service of this notice upon you, exclusive of the day of service, an answer identifying the property in which you claim to have an interest, stating the nature and extent of the interest claimed and stating all your objections and defenses to the taking of your property. A failure so to serve an answer shall constitute a consent to the taking and to the authority of the court to proceed to hear the action and to fix the just compensation and shall constitute a waiver of all defenses and objections not so presented.

You Are Further Notified that if you have no objection or defense to the taking, you may serve upon plaintiff's attorneys a notice of appearance designating the property in which you claim to have an interest, and thereafter you shall receive notice of all proceedings affecting the said property.

And You Are Further Notified that at the trial of the issue of just compensation, whether or not you have answered or served a notice of appearance, you may present evidence as to the amount of the compensation to be paid for the property in which you have any interest, and you may share in the distribution of the award of compensation.

Dated: March 22, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney;

By /s/ RICHARD A. LAVINE,
Attorneys for Plaintiff. [4]

Schedule "A"

The following described tracts of land aggregate 20,007.29 acres of land, more or less, and are situated in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land [5] Management:

* * *

Tract No. K-1528

The South $\frac{1}{2}$ of the Northeast $\frac{1}{4}$ and the East $\frac{1}{2}$ of the Northeast $\frac{1}{4}$ of the Northeast $\frac{1}{4}$ of Section 22, Township 10 North, Range 12 West, San Bernardino Meridian, according to the official plat of the survey of said land approved by the Surveyor General on September 19, 1856, containing 100.00 acres, more or less. [15]

* * *

Schedule "B"

The following named persons are the presumptive owners of, or claimants of an interest in, the property involved in this action: [19]

* * *

K-1528—Cole Investment Company, a California Corporation.

* * *

[Endorsed]: Filed January 6, 1958. [23]

[Title of District Court and Cause.]

SCHEDULE OF WITNESSES ON BEHALF
OF (1) FELA HOLZMAN TRACT K-1516;
(2) COLE INVESTMENT CO. TRACTS
K-1523 AND K-1528

Pursuant to the Pretrial Order entered herein, defendants Cole Investment Co. (Tracts K-1523

and K-1528, and Fela Holzman (Tract K-1516), herewith submit their Schedule of Witnesses as to Value:

Walter B. Congdon, Appraiser for Tait Appraisal Company.

Tract K-1516, owned by Fela Holzman and described as E $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 15, T10N R12W, inspected on May 29, 1957, and appraised as of March 22, 1955, at \$14,000.00; that details of appraisal consisted of a complete study of the district as to its present and future possibilities for development and use; that its highest and best use is considered to be for subdivision into small acreage tracts for home purposes; that comparable sales in the district have been considered and properties in question inspected; that the property is located close to (only about one mile) to the main Lancaster-Mojave highway and only 8 miles from the city of Mojave, where stores, schools and churches are located; that many of the immediate ranches surrounding this property have been subdivided and are improved with homes, poultry ranches, apartment rentals, etc.; that property is level, with good drainage and a good sandy loam soil; that water is available from wells at very little expense.

Note: Complete and detailed Appraisal report on this property will be submitted to the court at time of trial for consideration. [66]

Fela Holzman, Owner of Above-Described Tract.

That she is a widow with two adult sons; that said property has been held by her family for ap-

proximately 40 years; that she has refused many offers to buy said property for the reason that it has been the intention of herself and sons to develop and improve said property and make their home there at some time in the future; that said property, in her opinion is not less than \$250.00 per acre or a total of \$20,000.00.

Ruth K. Bandy, Re Tracts K-1523 and K-1528.

That she is President of Cole Investment Co., a California corporation, who owns the above-mentioned tracts together with various and sundry other properties in this district and elsewhere; that her father homesteaded in this district many years ago and that various members of her family originally owned various tracts in the vicinity; that the corporation owns the 20-acre ranch home lying adjacent to and west of the subject property; that said ranch has subsequently been developed into 8 rental units bringing a net income of \$536.00 monthly. That on this particular 20 acres a deep well was developed with a large reservoir, and equipped with pump and pipe to irrigate and develop the subject properties taken by the United States; that it was the intention of Cole Investment Co., and the work was commenced prior to the taking, to develop the subject property by constructing residential units thereof for rentals and sales; that since the taking of said lands Cole has had to move its program of development approximately one mile north in a less favorable location and develop water therefor. A number of rental units have been built and are now occupied. That

she is now and has been for many years fully advised as to land values in this area and that the reasonable and fair value of the subject land at the time of taking was not less than \$250.00 per acre, or a total sum of \$30,000.00; that Cole in addition thereto has suffered Net Severance Damage in the sum of \$7,000.00 as per appraisal of Tait Appraisal Company on account of the well, pumps and pipe aforesaid.

Walter B. Congdon, Re the Two Last Mentioned Tracts:

In addition to the facts set forth on page one (1) in connection with Tract K-1516 has appraised the subject property as follows:

Parcel #1. $S\frac{1}{2}$ of $NE\frac{1}{4}$ of Sec. 22, T10N R12W, 80 acres @ 200.00, total \$16,000.00.

Parcel #2. $E\frac{1}{2}$ $NE\frac{1}{4}$ of $NE\frac{1}{4}$ Sec. 22, T10N R12W, 20 acres @ 175.00, total \$3,500.00.

These properties are designated as Tract K-1528.

Parcel #3. $E\frac{1}{2}$ of SW NW of Sec. 23, T10N R12W, 20 acres @ 175.00, total \$3,000.00 (Tract K-1523). [67]

That Cole Investment Co., has in addition to the land value, suffered Net Severance Damage in the manner and amounts referred to in the statement of Ruth K. Bandy of page 2 hereof.

Note: A complete appraisal report will be presented to the Court for consideration at the time of trial.

Cecil Minugh, Real Estate Broker, Lancaster, California.

That in addition to the corroboration of the testimony and facts as related to Fela Holzman, Ruth K. Bandy, Walter B. Congdon, he will present evidence that he is a real estate broker with the firm of Hartwig Realty Company of Lancaster, California; that the past several years they have concentrated a portion of their business in the area under question; that they have made a number of sales in the immediate district and are thoroughly familiar with the subject property and know of its highest and best usage; that all of the subject property is highly suitable for subdivision purposes, with ample water at reasonable price and costs, level land with good soil, accessibility to highways, schools, stores and churches; that with water being available all of the subject land could be subdivided into five and ten acre tracts and sold at the present time to net the owners not less than \$400.00 per acre; that as of March 22, 1955, it could have netted the owners not less than \$200.00 per acre.

Dated June 12, 1957.

Respectfully submitted,

/s/ LLOYD J. SEAY,

Attorney for Fela Holzman
and Cole Investment Co.

[Endorsed]: Filed June 14, 1957. [68]

[Title of District Court and Cause.]

STATEMENT AS TO JUST COMPENSATION
ON BEHALF OF (1) FELA HOLZMAN
TRACT K-1516; (2) COLE INVESTMENT
CO., TRACTS K-1523 AND K-1528

Pursuant to Order and Notice of Pretrial Conference entered herein, defendants Fela Holzman and Cole Investment Co. herewith submit their statement as to Just Compensation.

Tract K-1516, Fela Holzman, E $\frac{1}{2}$ of SE $\frac{1}{4}$ Sec. 15, T10N, R12W.

Fela Holzman, owner of this tract, contends as follows:

(1) That she feels the minimum fair market value, in cash, at the time of taking is \$250.00 per acre, that her appraiser contends that the reasonable value is \$175.00 per acre or a total of \$14,000.00, which latter sum she adopts as the minimum fair market value.

(2) Benefits resulting from the taking. None.

(3) Severance damage. None.

(4) The minimum amount claimed to be due on this tract is the sum of \$14,000.00, less the sum of \$4,000.00 heretofore paid, leaving a balance of \$10,000.00.

Tract K-1523, Cole Investment Co. E $\frac{1}{2}$ of SW NW,
Sec. 23, T10N, R12W.

Cole Investment Co., owner of this tract, contends:

(1) President Ruth K. Bandy asserts the minimum fair market value, in cash at the time of taking is \$250.00 per acre; that Cole's appraiser has placed a value of \$150.00 per acre or \$3,000.00 for the 20 acres, which latter valuation is adopted as the [69] minimum fair market value.

(2) Maximum amount of conceded benefits.
None.

(3) Severance damage. Claimed under Tract K-1528.

(4) The minimum amount claimed to be due on this tract is \$3,000.00, less the sum of \$1,100.00 heretofore paid, leaving a balance due in the sum of \$1,900.00.

Tract K-1528, Cole Investment Co.

Cole Investment Co., owner of this parcel, contends:

(1) Lands described as Parcel #1. S $\frac{1}{2}$ of NE $\frac{1}{4}$ Sec. 22, T10N R12W, 80 acres, appraised by Cole's appraiser at \$200.00 per acre or \$16,000.00, and Parcel, #2, E $\frac{1}{2}$ NE NE Sec. 22, T10N, R12W, 20 acres appraised by Cole's appraiser at \$175.00 per acre or \$3,500.00, making a total appraisal for Tract

K-1528 of \$19,500.00. Cole contends that it feels the minimum fair market value for this tract at the time of taking to be \$250.00 per acre or \$25,000.00. However, for the purposes herein set forth Cole adopts the totals as appraised by Cole's appraiser, to wit: \$16,000.00 and \$3,500.00 or a total of \$19,500.00 as the minimum fair market value.

(2) Conceded benefits resulting from taking. None.

(3) The minimum amount of claimed damages proximately resulting from severance is \$7,000.00, detailed as follows:

Appraisal of Well, Reservoir, etc.

Well 500' deep, 12" steel casing gravel packed, equipped with 15 HP Byron Jackson pump	
Appraised Value	\$ 6,450.00
Open earth constructed Water Reservoir	
Appraised Value	400.00
Pipe necessary to carry water from this well to properties being appraised (Overhead System)	4,550.00
Pressure Pump for use with above	250.00
	<hr/>
Total Appraised Value	\$11,650.00

Less Value of material that could be
sold after abandonment

Well Pump\$2,000.00

Pipe (Overhead Sys-
tem) 2,500.00

Pressure Pump 150.00 \$ 4,650.00

Net Severance Damage\$ 7,000.00

(4) The minimum amount claimed to be due
Cole Investment Co. for this tract is: land
\$19,500.00, severance damage \$7,000.00, total
\$26,500.00, less the sum of \$8,550.00, hereto-
fore paid leaving a balance for this tract in
the sum of \$17,950.00.

Summary of Balances Claimed to be Due as Just Compensation

Tract K-1516, Fela Holzman\$10,000.00

Tract K-1523, Cole Investment Co... 1,900.00

Tract K-1528, Cole Investment Co... 17,950.00

In connection with the last two tracts mentioned,
and by way of further estimation of values Cole
Investment Co., if legally possible, if allowed to
retain the 120 acres, pay to the Plaintiff the sum
of \$200.00 per acre, including the sums heretofore
received by Cole from the United States.

Respectfully submitted,

/s/ LLOYD J. SEAY,

Attorney for Fela Holzman
and Cole Investment Co.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 19, 1957. [71]

United States District Court, Southern District of
California, Northern Division

No. 1449-ND Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

20,007.29 ACRES OF LAND, MORE OR LESS,
AND A CERTAIN UNPATENTED MINING
CLAIM, in the COUNTY of KERN, STATE
OF CALIFORNIA, et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

(As to Tracts G-1200, G-1209, G-1210, G-1213,
G-1214, G-1215, G-1217, G-1221, G-1222,
G-1224, G-1226, G-1231, H-1305, H-1312, J-1407,
K-1515, W-3000, G-1203, J-1406, K-1523, K-1528,
K-1516, J-1423, J-1424, and J-1454.)

The above-entitled eminent domain proceeding with respect to Tracts G-1200, G-1209, G-1210, G-1213, G-1214, G-1215, G-1217, G-1221, G-1222, G-1224, G-1226, G-1231, G-1305, H-1312, J-1407, K-1515, W-3000, G-1203, J-1406, K-1523, K-1528, K-1516, J-1423, J-1424, and J-1454, came on regularly for trial in this court on September 3, 1957, continuing through September 17, 1957, before the Honorable Gilbert H. Jertberg, Judge of the above-entitled court, and a jury of twelve duly qualified

persons empaneled and sworn to try the issues upon the pleadings herein.

Plaintiff appeared by its attorney, Laughlin E. Waters, United States Attorney; by Richard J. Dauber, Assistant United States Attorney. The defendant, Southern Pacific Land Company, a California corporation, appeared by its attorneys E. D. [72] Yeomans, Roger M. Sullivan, Randolph Karr, and Paul V. DeFord, by Roger M. Sullivan. The defendant, Title Insurance and Trust Company, Trustee for Louis J. McGeary, and Trustee for Eleanora D. Sellery, appeared by its attorneys Holbrook, Tarr & O'Neill, by Richard L. Huxtable. The defendants, Virgil O. Rewick, Ruth Elizabeth Rewick, William W. Fowler, and Jeanette B. Fowler, appeared by their attorney Daniel Dougherty. The defendant Cole Investment Company, a California corporation, appeared by its attorney Lloyd J. Seay. The defendant Fela Holzman, appeared by her attorney, Lloyd J. Seay. The defendants M. O. Moore and Elsie L. Moore, appeared by their attorney George J. Stepovich, by Richard V. Aten. The defendants Sylvia Spencer Welch and Richard Vanderhof Aten appeared by their attorneys McCutchen, Black, Harnagel & Green, by Robert A. Fletcher, and Aten & Aten, by Richard V. Aten.

The defendant County of Los Angeles, appeared in writing by its attorney Harold W. Kennedy, County Counsel, by Robert A. Von Esch, Jr., Deputy County Counsel, and on March 13, 1957, filed herein

its Disclaimer as to all tracts involved herein. The defendant County of Kern, appeared in writing by its attorney Roy Gargano, County Counsel, by Kit L. Nelson, Assistant County Counsel, and on April 12, 1956, filed herein its Disclaimer as to all tracts involved in these proceedings insofar as taxes on said tracts are concerned.

Witnesses on the part of plaintiff and defendants were sworn in the case and evidence, both oral and documentary, was introduced upon the issues. The matter was argued by counsel for the respective parties and the jury was instructed by the court; thereupon the jury retired and deliberated and subsequently returned into court and rendered the following verdict:

“We, the jury, find the fair market value of [73] and just compensation for the taking in condemnation, as of March 22, 1955, of the following numbered tracts of land, as each said tract is described in the Complaint in Condemnation on file in this action, to be as follows: [74]

* * *

“Tract K-1528, containing 100 acres, more or less, the sum of \$15,000.00;

* * *

“September 17, 1957.

“GORDON E. BLADE,
“Foreman.”

And the court, upon the pleadings, evidence and verdict of the jury, and good cause appearing therefor, hereby makes and files the following:

Findings of Fact

This matter was regularly commenced by plaintiff on [75] March 22, 1955, by filing its Complaint in Condemnation and Declaration of Taking herein to acquire title to the property therein described, including Tracts G-1200, G-1209, G-1210, G-1213, G-1214, G-1215, G-1217, G-1221, G-1222, G-1224, G-1226, G-1231, H-1305, H-1312, J-1407, K-1515, W-3000, G-1203, J-1406, K-1523, K-1528, K-1516, J-1423, J-1424, and J-1454. Plaintiff simultaneously deposited into the registry of this court the following sums for the use of the parties entitled thereto for the taking of the following tracts:

	* * *	
		Deposit
Tract No.		Amount of
K-1528		\$ 8,750.00
	* * *	

During the course of the trial on the issue of just compensation, the defendant Cole Investment Company claimed severance damage by reason of the taking of Tract K-1528. Argument of counsel was heard by the court outside the presence of the jury, and the court finds and concludes that there was no severance damage in law or in fact by virtue of the taking of said Tract K-1528. [78]

Just compensation for the taking of Tract K-1528 is the sum of \$15,000.00, together with interest at the rate of 6% per annum on the sum of \$6,250.00 from March 22, 1955, to the date of deposit of said sum in the registry of the court. The sum of \$8,550.00 heretofore paid by order of court shall be credited against said just compensation. [85]

* * *

There was no severance damage caused by the taking of Tract K-1528 formerly owned by defendant Cole Investment Company, a California corporation.

Based upon the preceding Findings of Fact and Conclusions of Law, it is hereby

Ordered, Adjudged and Decreed that

Plaintiff, United States of America, is entitled to condemn Tracts G-1200, G-1209, G-1210, G-1213, G-1214, G-1215, G-1217, G-1221, G-1222, G-1224, G-1226, G-1231, H-1305, H-1312, J-1407, K-1515, W-3000, G-1203, J-1406, K-1523, K-1528, K-1516, J-1423, J-1424, and J-1454 as described in the Complaint and Declaration of Taking on file herein for the public uses set forth in said Complaint, and title to all of said tracts vested in the plaintiff, United States of America, upon the filing of said Declaration of Taking on March 22, 1955. [86]

* * *

The just compensation for the taking of Tract K-1528 is the sum of \$15,000.00 together with interest at the rate of 6% per annum on the sum of

\$6,250.00 from March 22, 1955, to the date of deposit by plaintiff of said sum of \$6,250.00 plus said interest in the registry of the court.

* * *

Plaintiff, United States of America, is directed to deposit in the registry of the court with respect to the following tracts the following sums representing the deficiencies in the amounts of the deposits heretofore made, together with interest on said sums at the rate of 6% per annum from March 22, 1955, until the date of each respective deposit: [90]

Tract No.	Amount of Deficiency
K-1528	\$6,250.00

* * *

The clerk of this court is directed to disburse and pay out of the registry of the court to Cole Investment Company, a California corporation, the sum of \$15,000.00, together with interest on the sum of \$6,250.00 as aforesaid, less \$8,550.00 heretofore paid, with respect to Tract K-1528. [94]

* * *

The court reserves jurisdiction herein to make such other and further orders, judgments and decrees as may be necessary and proper.

Dated: This 14th day of November, 1957.

/s/ GILBERT H. JERTBERG,
United States District Judge.

Presented by :

LAUGHLIN E. WATERS,
United States Attorney ;

RICHARD J. DAUBER,
Assistant U. S. Attorney ;

By /s/ RICHARD J. DAUBER,
Attorneys for Plaintiff.

Lodged November 8, 1957.

[Endorsed]: Filed November 14, 1957.

Entered November 18, 1957. [95]

[Title of District Court and Cause.]

NOTICE OF APPEAL ON BEHALF OF COLE
INVESTMENT CO. TRACTS K-1528

To Laughlin E. Waters, United States Attorney, and
Richard J. Dauber, Assistant United States
Attorney, and the United States of America,
Plaintiff:

You and each of you will please take notice that the defendant Cole Investment Co., a California corporation (Tract K-1528) intends to and does hereby appeal to the United States Court of Appeals for the Ninth Circuit from a portion of that certain judgment signed and entered in the above-entitled action on November 14, 1947, pursuant to notice that judgment in the above matter was entered, said notice being dated November 18, 1957.

That the portion of said judgment including the Findings of Fact and Conclusions of Law hereby specifically appealed from are described as follows:

A. That portion of the Findings of Fact as set forth on page seven commencing at line 22 and ending with line 28.

B. That portion of the Findings set forth on page fourteen commencing at line 15 and ending with line 20 insofar as [97] it does not include any amount for severance damages only.

C. That portion of the Findings set forth on page fifteen commencing at line 14 and ending at line 16.

D. That portion of the judgment set forth on page nineteen commencing at line 1 and ending at line 5 only insofar as it does not include any compensation for severance damages.

E. That certain ruling made orally by the Court on September 10, 1957, in which the Court rejected the offer of proof with respect to severance damages.

Dated at Los Angeles, California, November 27, 1957.

/s/ LLOYD J. SEAY,

Attorney for Cole Investment
Co.

Affidavit of service by mail attached.

[Endorsed]: Filed December 2, 1957. [98]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 102, inclusive, containing the original:

Notice of Filing of Action.

Schedule of Witnesses on behalf of Fela Holzman and Cole Investment Co.

Statement as to Just Compensation as to Fela Holzman and Cole Investment Co.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal on behalf of Cole Investment Co., Tract K-1528.

Designation of Record on Appeal on behalf of Cole Investment Co., Tract K-1528.

B. Defendant Cole Investment Co., Exhibit "A."

C. One volume of Reporter's Official Transcript of proceedings had on:

September 10, 1957.

I further certify that my fee for preparing the foregoing record amounting to \$1.60 has been paid by appellant.

Dated: January 7, 1958.

[Seal] JOHN A. CHILDRESS,
 Clerk;

By /s/ WM. A. WHITE,
 Deputy Clerk.

In the United States District Court, Southern
District of California, Northern Division
No. 1449-ND—Civil

UNITED STATES OF AMERICA,
 Plaintiff.
 vs.

20,007.29 ACRES OF LAND IN THE COUNTY
OF KERN, STATE OF CALIFORNIA, etc.,
et al.,
 Defendants.

Honorable Gilbert H. Jertberg, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

(Tracts K-1523 and K-1528 Cole Investment Co.)

Outside Presence of Jury

Appearances of Counsel:

For the Government:

LAUGHLIN E. WATERS,
United States Attorney; By
RICHARD J. DAUBER,
Asst. United States Attorney.

For the Defendant Cole Investment Co.:
LLOYD SEAY, ESQ.

Tuesday, September 10, 1957, 4:00 P.M.

(The following proceedings were had after the jury retired:)

The Court: Let the record show the jury has retired from the courtroom. I might state for those in attendance I am going to consider at this time certain phases of the Cole Investment Company property, being tracts K-1523 and K-1528, so anyone here who is not interested in those tracts of course need not stay. If there are any witnesses here relating to these other tracts, they are directed to return tomorrow morning at 9:30.

All right, Mr. Seay, we will proceed on this matter.

Mr. Seay: May it please the Court, it is the contention of Cole, and we have and are making claim for severance damage, based upon the fact that tract K-1528 has always been since the acquisition of the property considered by Cole and the Bandys as part of the 20 acres, which is known as the Bandy Ranch, lying to the west of the Lone Butte Road. Back in around '48 it was the intention of Bandy and Cole——

Mr. Dauber: Your Honor, may I interrupt. I am sorry, I don't mean to interrupt, but are we going to have Mr. Seay just argue the point and testify as to intention?

The Court: No, I gather this is a presentation of Mr. Seay's contention with respect to severance damage.

Mr. Dauber: I see. I am sorry I interrupted. [2*]

Mr. Seay: In the event the Court determines otherwise, I would certainly then make an offer of proof, with the Court's permission.

In other words, the 100 acres lying to the east of Sopp Road and the 20 acres—I mean the Lone Butte Road, and the 20 acres to the west of Lone Butte Road, as far as the owners are concerned, is a tract of land. True there was an easement created through there, which is now designated as Lone Butte Road. It is my understanding that it was never a dedicated road. It was developed and put in there by the predecessor, or grandparents or parents of Mrs. Bandy, for their own convenience, and not for the purpose of separating the two tracts.

Now, in the course of and during the ownership a well was drilled. Now there is already, I believe, existing the domestic water wells on the property, and at the present time there are two, on the west 20 acres to the west of Lone Butte Road.

In about 1948, their plan was to develop and farm the 100 acres across the road, and in connection with that they drilled a deep well, which I understand is 500 feet deep, and proved to be of sufficient size to furnish water to the 100 acres to the east along Lone Butte Road. They purchased and installed a pump, and the necessary bowls and motor and everything in connection with it. [3]

After the water was developed, and they had ample water, they caused to be developed adjacent

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

to the well a reservoir, which was intended to be used in connection with the irrigation of the 100 acres across to the east.

According to our appraiser, we have a valuation of the well and the pump as at the time it was developed—I don't know whether that would be cost at the present time—but our appraiser has fixed a value of the well and pump at \$6,450; the reservoir at \$400; all of which is located on the 20 acres to the west of the property, or to the west of the 100 acres in question.

Now, the Bandys acquired pipe to carry the water over to the condemned property, which, according to the appraiser, cost at the time \$4,550.

In addition to that it was necessary to buy a pressure pump, which is used for overhead sprinkler irrigation, and on which the appraiser has placed a value of \$250, giving us a total appraised value of the property which we claim severance damage for of \$11,650.

Now, I might say since it became general knowledge that the property might be taken the Bandys—I might add further their tenant who was doing this work, when he learned of the possibility of the taking of the 100 acres, abandoned the farming project. Prior to that time he had cleared out and got ready for cultivation the 80 acres, the south 80 acres of [4] the 100 acres, with the exception of that 20 acres which extends to the north.

As I say, the tenant at that time abandoned the project, and as a result of that we have no further use for the well, except to utilize it to some extent,

but the purpose for which it was developed has been taken away from us, or the use for which it was developed has been taken away from us. So we no longer need that big well. We couldn't afford to operate it for the purposes of domestic water. Besides that, we have two other wells, ample to take care of that, including the necessary shrubbery irrigation.

So as a result of that, we are stuck with a pump, to which the appraiser has given as of the date of taking a salvage value of \$2,000. The pipe and overhead system, which I understand practically all of it has been disposed of, but at the time of the condemnation the appraiser has given the pipe the valuation of \$2,500; likewise the pressure pump of \$150. In other words, what we have which we no longer can use and the loss occasioned thereby totals \$4,650.

Now, taking the \$4,650 leaves what we claim for those items alone, \$7,000.

Now, another question comes to mind here. It is my understanding, and the proof will show, what is now designated as Lone Butte Road at the time of the taking was never a dedicated road. It consisted of a 20-foot trail or easement [5] which traversed from the south end of the property on up a mile or two to the north. It is my understanding that since the property was condemned and taken by the government that a question arose, which was serious to the Bandys, as to whether or not they were taking and legally the title description took in what was then known as the easement,

which is now designated as Lone Butte Road. No title had been conveyed.

They were then alarmed as to how much the government would take. If they took it over to the fence then the 20-acre Bandy Ranch would be left without an easement to get to the highway. They took the problem up with the various and sundry officials in the army bases in Washington, Baltimore, resulting in the government granting to the county all the rights to the existing easement plus ten feet which gave up to the Bandy line 30 acres——

The Court: You mean 30 feet.

Mr. Seay: Thirty feet, and then it became necessary, in order to carry out the road program, it became necessary for the Bandys to dedicate and deed to the county an additional 30 feet, before they could get any co-operation from the county.

Now, all of that negotiation and all those transactions took place since the date of the taking, and at the time we had a right to go across the property with our irrigation, we [6] had no interference from any source, I should say. That was our intention and our plan.

Now, a slight other claim which we had in mind was the cost of removal of the fence, which is a steel fence embedded in concrete, which we would have to move back the required 30 feet. As the Court knows and everybody observed, there is a border of trees. Our severance damage in that connection would be the cost of removing the fence and replanting the trees, which I believe has been

intimated as about \$500. Also by reason of the necessity, we would lose approximately one acre of land, which testimony would show would be valued at approximately \$1,000 per acre.

However, in going further in what I anticipated the record would show, would be that the appraiser would probably show that the road dedication and the creation of a 60-foot road would approximately increase the valuation of the property to the extent of the value of the land actually taken from the Bandy Ranch, so I think that would become a nullity.

But we seriously urge the right to present the damage with reference to the well and pipe and casing, the right to use which has been taken away from us, and as I say, for a period from 1948 up to the actual date of taking, the Court and everyone knows personal property of this nature is naturally going to decrease in value, and unless we are permitted to use it we have suffered a loss, based upon some [7] figure to be determined by the Court and jury, and in view of those facts we feel that we are entitled to present to the jury the question of severance.

The Court: Well, Mr. Seay, first, with respect to the 20 acres, known as the Bandy headquarters, located on the east side of the Lone Butte Road, is there any claim that the fair market value of that 20 acres has been affected or suffered by the taking of the 100 acres?

Mr. Seay: No.

The Court: Now, as I understand your state-

ment, all of the personal property, the pressure pump, the well, the reservoir, and the pipe, are located on the 20 acres, that is the Bandy headquarters?

Mr. Seay: Yes, the pump and the booster pump was located on this property, and we had the pipe to conduct it over to the 100 acres all during this time. However, I understand it has since been disposed of.

The Court: Yes. Well, what I was interested in, on the date of taking all of the property you speak of, was located on the Bandy headquarters?

Mr. Seay: That is right.

The Court: Now, at any time did the plan of a unitized operation of the 100 acres and the 20 acres get beyond the stage of planning? Did it ever get beyond the stage of planning? [8]

Mr. Seay: I would say this in this way, your Honor: Experimental crops were planted on the 20 acres, a very small amount of some six or eight or ten crops, to determine—well, in other words, they were experimenting to see what would grow and what the possibilities were. They did determine that, and then, as I say, they had a tenant who was going across the road, and he leveled out and cleaned it out and got it in preparation—there was no leveling to do, but he got it ready.

The Court: But water was never conveyed across the road from the reservoir or pumped to the 80 acres?

Mr. Seay: To my knowledge it wasn't conveyed

over there for the purpose of growing any crops. There might have been some test runs to see the contours of the land and level in the preparation for eventual distribution of water.

The Court: I see. Now, it is my understanding of the testimony of Mrs. Bandy, and also Mr. Congdon, that the highest and best use of the 100 acres was for desert home sites.

Mr. Seay: That is right.

The Court: Now, with respect to the Lone Butte Road, it is my understanding that generally when the government takes it takes subject to reservations and easements and rights of way, so legally, when the government filed its declaration of taking, the taking was subject to that prescriptive right, or whatever it was, a prescriptive right or an easement there. [9]

Now, as I understand it, as a result of a conference between the Bandys and the federal government and the county, the government deeded to the county 30 feet, if the 20-foot easement was included.

Mr. Seay: I might make an observation at this point, your Honor. As far as the county is concerned, of course they know the easement was there, and they knew that the Base was taking it subject to the easement, because of those allegations and the statements, I believe, in the complaint. However, the county, even though they knew the easement was there, they would not construct this road to the protection of the Bandys, or take any steps until they had a clearance from the government,

plus the easement right, they had to have title to it. They demanded that, and through a year of negotiations they acquired it by giving up 30 feet on the other side.

The Court: The Bandys, in other words, deeded to the county 30 feet on their side, so to speak, on the east side of Lone Butte Road, and the government finally conveyed 30 feet on the west side of the road.

Mr. Seay: That is right.

The Court: Giving a 60-foot road there. Well, I think I understand the situation.

Mr. Dauber, do you have anything to say at this stage? [10]

Mr. Dauber: No, except, your Honor, as it has been shown here in the testimony that there was no unitized use and there was no before and after difference in valuation, and also it might be pointed out, although it has not been shown and it is very possible the government did not have an obligation to convey any property for the purpose of a roadway, still the government did convey a 30-foot strip to the county in order that access might be retained to the Bandy Ranch. Other than that I have no comments.

Mr. Seay: I think, your Honor, under the case of *People vs. Thompson*, 43 Cal. (2d) page 17, in 1954, that where there is no actual diversity of use of the property any easement of the road will not destroy the contiguity. In other words, unity of use, mere failure to use some of the property does not constitute diversity of use. I am sure the Court is

familiar with that case, and we submit that applies in this instant case.

The Court: Well, it is my view, Mr. Seay, under the contentions as presented, and my view of the law, federal law dealing with severance that there is no severance damage in this case for which the owners are entitled to compensation. And I would rule, if the witnesses testified along the lines you suggested, that their testimony couldn't properly go before the jury.

Now, in order for you to preserve your record, I am [11] perfectly willing for you to make an offer of proof as to what the witnesses, if called, would testify to, so that your record would be preserved in the event I am wrong and the higher court reviews the matter.

Mr. Seay: Well, let me put it this way, it may shorten it: I have heretofore made a broad statement on the matter, as to what the witnesses would testify, to wit, Mrs. Bandy on behalf of Cole, and Mr. Congdon as the appraiser, and without repeating the entire matter, I would present as my offer of proof the statement which has been heretofore made by me for the Court's consideration.

The Court: Do you have anything to say in relation to that offer of proof, Mr. Dauber?

Mr. Dauber: No, your Honor.

Mr. Seay: Will you stipulate that if the witnesses were sworn that our testimony would be substantially in the form of the statement as presented by me?

Mr. Dauber: Well, I don't believe that it is

necessary for me to stipulate to that, is it, your Honor? He is making his offer of proof.

The Court: No, I think not. In other words, you offer to prove that those witnesses would if sworn in this case testify substantially as outlined in your contentions?

Mr. Seay: I believe that covers it.

The Court: And I assume that if they were asked by Mr. [12] Dauber the same questions that I asked you, that their answers would be substantially the same as your answers?

Mr. Seay: That is so.

The Court: All right. Well, then, the Court will reject the offer of proof with respect to severance damage.

(Discussion by Mr. Dougherty as to judicial notice, and adjournment at 4:30 p.m.) [13]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct partial transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Fresno, California, this 12th day of
September, 1957.

/s/ HELEN G. SCHULKE,
Official Reporter.

[Endorsed]: Filed December 2, 1957. [14]

[Endorsed]: No. 15850. United States Court of
Appeals for the Ninth Circuit. Cole Investment Co.,
a Corporation, Appellant, vs. United States of
America, Appellee. Transcript of Record. Appeal
from the United States District Court for the
Southern District of California, Northern Division.

Filed January 8, 1958.

Docketed January 15, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

COLE INVESTMENT CO., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal From The United States District Court
For The Southern District of California,
Northern Division

BRIEF FOR THE UNITED STATES, APPELLEE

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FILED
MAY 8 1950

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of Argument	6
Argument:	
Under well established principles relating to so-called "severance damages", the district court was correct in its ruling in this case.....	7
A. Severance damages are based upon an impairment in the market value of the remaining portion of a single tract....	7
B. Under the facts, severance damages were properly excluded in this case.....	9
C. The appellant has been treated well in the instant case.....	14
D. "Severance damages", as other damages, must not be based upon speculation....	15
E. There could be no recovery as to part of the property for which the appellant claims severance damages for another reason	16
Conclusion	17

CITATIONS

Cases:

<i>Aaronson v. United States</i> , 79 F.2d 139.....	15
<i>Baetjer v. United States</i> , 143 F.2d 391 cert, den. 323 U.S. 772.....	8, 11
<i>Bauman v. Ross</i> , 167 U.S. 548.....	8, 15
<i>Kennebec Water Dist. v. Waterville</i> , 97 Me. 185, 54 Atl. 6.....	9
<i>Oakland v. Pacific Coast Lumber etc. Co.</i> , 171 Cal. 392, 153 Pac. 705.....	9
<i>Sharp v. United States</i> , 191 U.S. 341.....	9
<i>Sharpe v. United States</i> , 112 Fed. 893, affirmed 191 U.S. 341.....	7, 11, 12, 14, 16

Cases—Continued	Page
<i>St. Louis, M. & S. R. Co. v. Aubuchon</i> , 199 Mo. 352, 97 S.W. 867.....	9
<i>United States v. Crary</i> , 2 F.Supp. 870.....	9
<i>United States v. Grizzard</i> , 219 U.S. 180.....	8, 12, 15
<i>United States v. Honolulu Plantation Co.</i> , 182 F.2d 172, cert. den. 340 U.S. 820.....	9, 12
<i>United States v. Inlots</i> , 26 Fed. Cas. No. 15,441a, affirmed <i>sub. nom. Kohl, v. United States</i> , 91 U.S. 367	9
<i>United States v. Meyer</i> , 113 F.2d 387, cert. den. 311 U.S. 706.....	11
<i>United States v. Miller</i> , 317 U.S. 369.....	11
<i>United States v. Montana</i> , 134 F.2d 194, cert. den. 319 U.S. 772.....	11
Statutes:	
Sec. 1248 of the California Code of Civil Procedure	10
Miscellaneous:	
Rule 71A(h) F.R.Civ.P.	11
2 Lewis on Eminent Domain (3d ed.), Sec. 728....	16

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15850

COLE INVESTMENT CO., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Upon Appeal From The United States District Court
For The Southern District of California,
Northern Division**

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion. Its judgment was based upon the verdict by a jury awarding compensation for the tract of land on appeal. Findings of fact, conclusions of law and judgment by the district court appear in the record at pages 16-22.

JURISDICTION

This is an appeal from a judgment entered by the district court on November 18, 1957 (R. 20-22). The jurisdiction of the district court was invoked by the United States under the Act of August 1, 1888, 25

Stat. 357, 40 U.S.C. sec. 257, and other statutes authorizing condemnation to acquire lands for the purpose here involved and appropriating funds therefor (R. 4). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether severance damages were properly excluded in the circumstances of this case.

STATEMENT

The single tract involved in this appeal (Tract K-1528), owned by the appellant, was acquired by the United States in connection with the Edwards Air Force Base, California. A declaration of taking was filed and estimated just compensation for the tract was deposited in the amount of \$8,750.00 (R. 19). Trial to determine just compensation for the taking of this tract, along with many others, was held before a jury in September 1957. Its verdict for this tract was in the amount of \$15,000.00 (R. 18). Judgment on that amount, based upon the jury's verdict, was entered on November 18, 1957, and the appellant has appealed from that judgment.

The appeal raises the single question as to whether the district court properly excluded evidence of severance damages. It is believed that the facts in connection with that ruling may fairly be summarized as follows:

The 100 acres of desert land here involved (K-1528) is a tract of land bounded on the west by Lone Butte Road (R. 27). According to counsel for the

appellant, Lone Butte Road, at the time of the taking "consisted of a 20-foot trail or easement which traversed from the south end of the property on up a mile or two to the north" (R. 29). Across Lone Butte Road to the west, so that its east boundary is Lone Butte Road, is another 20 acres of land also owned by the appellant. This 20-acre parcel is referred to in the record as the "Bandy headquarters" (R. 31).¹ Both Mrs. Bandy and Mr. Congdon, the two valuation witnesses for the appellant, testified that "the highest and best use of the 100 acres was for desert home sites" (R. 33).

To the time of the taking, the 100 acres to the east of Lone Butte Road, which was taken, and the 20 acres to the west of Lone Butte Road, which was not taken, had not been used as a unit. However, the offer of proof is, *inter alia*, that (R. 27) :

In about 1948, their plan was to develop and farm the 100 acres across the road, and in connection with that they drilled a deep well, which I understand is 500 feet deep, and proved to be of sufficient size to furnish water to the 100 acres to the east along Lone Butte Road. They purchased and installed a pump, and the necessary bowls and motor and everything in connection with it.

Appellant also offered to prove that the Bandys had acquired the pipe to carry the water to the condemned property (R. 28). Counsel for the appellant went on to state that the farming project had been

¹ The Cole Investment Company is a family-owned corporation of which Mrs. Ruth K. Bandy is president.

abandoned when the Bandys' tenant learned of the possibility of the taking of the 100 acres (R. 28). Because of their materiality, questions asked by the District Court and the answers thereto are set out verbatim below (R. 31-33):

* * * *

THE COURT: Well, Mr. Seay [counsel for the appellant], first, with respect to the 20 acres, known as the Bandy headquarters, located on the east (*sic*) side of the Lone Butte Road, is there any claim that the fair market value of that 20 acres has been affected or suffered by the taking of the 100 acres?

MR. SEAY: No.

* * * *

THE COURT: Now, at any time did the plan of a unitized operation of the 100 acres and the 20 acres get beyond the stage of planning? Did it ever get beyond the stage of planning?

MR. SEAY: I would say this in this way, your Honor: Experimental crops were planted on the 20 acres, a very small amount of some six or eight or ten crops, to determine—well, in other words, they were experimenting to see what would grow and what the possibilities were. They did determine that, and then, as I say, they had a tenant who was going across the road, and he leveled out and cleaned it out and got in it preparation—there was no leveling to do, but he got it ready.

² The portion omitted at this point clarifies that the personal property for which the appellant is seeking severance damages was all located on the 20-acre parcel known as the Bandy headquarters (R. 31-32).

THE COURT: But water was never conveyed across the road from the reservoir or pumped to the 80 acres? ³

MR. SEAY: To my knowledge it wasn't conveyed over there for the purpose of growing any crops. There might have been some test runs to see the contours of the land and level in the preparation for eventual distribution of water.

THE COURT: I see. Now, it is my understanding of the testimony of Mrs. Bandy, and also Mr. Congdon, that the highest and best use of the 100 acres was for desert home sites.

MR. SEAY: That is right.

* * * *

The record also discloses that some of the personal property involved in appellant's claim for severance damages had been disposed of prior to the trial (R. 29, 32). The record further shows that the Federal Government deeded to the county a 30-foot strip of land which, when added to a 30-foot strip deeded to the county by the Bandys, enabled the county to construct a 60-foot road out of Lone Butte Road (R. 30, 33-34). Counsel for the appellant acknowledged that the creation of the 60-foot road increased the value of the land constituting the Bandy headquarters, i.e., the land not taken for which severance damages are sought (R. 31).

To the offer of proof by the appellant, which consisted of the statement made by counsel for the appellant summarized above (R. 35), the District Court stated, *inter alia* (R. 35):

³ This reference is to the south 80 acres of the 100-acre tract (See R. 28).

Well, it is my view, Mr. Seay, under the contentions as presented, and my view of the law, federal law dealing with severance that there is no severance damage in this case for which the owners are entitled to compensation. And I would rule, if the witnesses testified along the lines you suggested, that their testimony couldn't properly go before the jury.

* * * *

This appeal followed.

SUMMARY OF ARGUMENT

Even if the 100 acres taken and the 20-acre "Bandy headquarters" had constituted one tract as contended by the appellant, the essential element for severance damages to be awarded, i.e., a lessened value of the part remaining, is not only not alleged but was, in fact, expressly denied to be present here (R. 31). Thus, without more, evidence of severance damages was properly excluded.

But there are several other reasons justifying the result here reached by the District Court. (1) The 20-acre parcel and the 100 acres taken were not in such a relationship to justify application of the severance damage principle, which requires, among other things, a unity of use. Here at best there was only a planned unity of use—and this was out of harmony with appellant's own concept of the highest and best use of the property and so may never have been realized even absent the taking. (2) The value of the appellant's 20-acre parcel was admittedly *increased* rather than diminished as a result of the Government's actions in this case. Also, in awarding

nearly double the estimated just compensation for the 100 acres, it appears that the jury may well have taken into consideration the matters here raised by the appellant though not in the form of severance damages as such. (3) Severance damages, as other damages, must not be based upon speculation. It is clear that testimony in this respect must not be "vague and speculative in character" and that testimony dealing with "possibilities more or less remote" is not properly to be considered. *Sharpe v. United States*, 112 Fed. 893, 897 (C.A. 3, 1902), affirmed 191 U.S. 341. Under the offer of proof in this case, any award of severance damages would, of necessity, have had to be speculative and based upon "possibilities more or less remote" (*ibid.*) (4) There could be no recovery for the strictly personal property items in any event. Accordingly, the denial of severance damages in the circumstances of this case was proper and the judgment of the District Court should not be disturbed.

ARGUMENT

Under Well Established Principles Relating to So-Called "Severance Damages", The District Court Was Correct in its Ruling in This Case.

This is an appeal from a ruling by the District Court that the appellant was not entitled to severance damages under the particular facts of this case. The ruling by the District Court was eminently correct for several reasons as will now briefly be shown.

A. *Severance damages are based upon an impairment in the market value of the remaining portion of a single tract*:—Severance damages are to be paid

when the taking of a portion of a tract of land has diminished the value of the part remaining. In such a case, just compensation for the taking includes the lessened value of the residue. E.g., *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *United States v. Grizzard*, 219 U.S. 180, 183 (1911). In the instant case, however, the appellant, by its counsel, expressly denied that the fair market value of the 20 acres not taken, which it asserts was part of a single tract with the 100 acres taken, had been affected or suffered by the taking of the 100 acres. Such denial could hardly have been in more explicit terms, as disclosed by the record and appellant's own brief as follows (R. 31; Br. 7):

The Court: Well, Mr. Seay, first, with respect to the 20 acres, known as the Bandy headquarters, located on the east (*sic*) side of the Lone Butte Road, is there any claim that the fair market value of that 20 acres has been affected or suffered by the taking of the 100 acres?

Mr. Seay: No.

Thus the very basis of a claim for severance damages, i.e., an impairment in the value of the remaining part is not only not alleged here but has, indeed, been expressly denied. So, accepting, *arguendo*, that the 20 acres was part of a single tract, with the fair market value of that 20 acres not having been affected, severance damages were properly not included in the award for the acreage taken. It is that simple. As succinctly put by the Court of Appeals in *Baetjer v. United States*, 143 F.2d 391, 396 (C.A. 1, 1944),

cert. den. 323 U.S. 772, "So, given a single tract under the test of unitary use and a taking of part of it, there may or may not be severance damages *depending upon whether the taking of the part operates to reduce the market value of what remains.*"⁴ Similarly, this Court expressed the principle even more succinctly by noting that "strict proof of the loss of market value to the remaining parcel is obligatory." *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 179 (C.A. 9, 1950), cert. den. 340 U.S. 820. With the taking admittedly not having reduced the market value of what remains in the instant case, there was no severance damage. *Ibid.*

B. *Under the facts, severance damages were properly excluded in this case:*—It is well settled that damages may not be awarded for injury to remaining land which, even though in the same ownership, is a different tract from the land condemned. *Sharp v. United States*, 191 U.S. 341, 353-355 (1903); *United States v. Crary*, 2 F.Supp. 870 (W.D. Va. 1932); *United States v. Inlots*, 26 Fed. Cas. No. 15,441a (S.D. Ohio 1873), affirmed *sub nom. Kohl v. United States*, 91 U.S. 367 (1875); *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6 (1902); *St. Louis, M. & S. R. Co. v. Aubuchon*, 199 Mo. 352, 97 S.W. 867 (1906). While the question may be left to the jury with appropriate instructions, ruling as a matter of law that the parcels are or are not united is within the province of the court. *Oakland v. Pacific Coast*

⁴ Emphasis added throughout this brief unless otherwise noted.

Lumber etc. Co., 171 Cal. 392, 397-398, 153 Pac. 705, 707 (1915). In view of the appellant's reliance upon Sec. 1248 of the California Code of Civil Procedure (Br. 9-11), the following language from the last cited case is appropriate here (171 Cal. at pp. 397-398; 153 Pac. at p. 707):

Complaint is made that the court by its rulings itself determined whether or not these pieces of property constituted one parcel within the meaning of section 1248 of the Code of Civil Procedure, and refused to allow this question to be submitted to the jury for determination. If appellant is right in his position that this was error, this consideration need not proceed further. But neither the state nor any of its mandatories, nor any other person or corporation, exercising the power of eminent domain, is compelled to submit to the determination of a jury every question of fact. (*Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, [147 Pac. 238]), and this question of fact (namely, whether or not, the probative facts being without controversy, the resultant fact establishes the existence of a parcel from which a portion is to be taken) is essentially a question of law for the determination of the court. It is only the "compensation," the "award" which our constitution declares shall be found and fixed by a jury. All other questions of fact, or of mixed fact and law, are to be tried, as in many other jurisdictions they are tried, without reference to a jury. (Const., art. I, sec. 14.) Therefore the court, in itself ruling and in not submitting to its jury the question whether the property taken constituted a part of the larger "parcel" com-

prising the mill property, adopted the proper procedure. * * * ⁵

In any event, from the facts disclosed by the record, it becomes apparent that the requisite unity of use for the so-called severance damages rule to apply was not present here. E.g., *Baetjer v. United States*, 143 F.2d 391 (C.A. 1, 1944), cert. den. 323 U.S. 772; *Sharpe v. United States*, 112 Fed. 893, 896 (C.A. 3, 1902), affirmed 191 U.S. 341. Thus, the 20-acre tract, known at the trial as "the Bandy headquarters" (R. 31), was located on the west side of Lone Butte Road (Br. 7). As to the 100 acres condemned as Tract K-1528, which were located on the other side of Lone Butte Road (R. 27), counsel for the appellant spoke of a plan for the unitized operation of the 100 acres and the 20 acres; but it is clear from the answer to an express question by the Court that the proposal for a unitized use never really got "beyond the stage of planning" (R. 32; Br. 8).⁶ Indeed, appellant's counsel acknowledged at the trial that Mrs. Ruth K. Bandy,

⁵ It should be noted that even before the passage of Rule 71A(h), F.R.Civ.P., this Federal eminent domain proceeding to determine the substantive question of just compensation to be awarded would have been governed by Federal rather than local law. E.g., *United States v. Miller*, 317 U.S. 369, 379-380 (1943); *United States v. Montana*, 134 F.2d 194, 197 (C.A. 9, 1943), cert. den. 319 U.S. 772; *United States v. Meyer*, 113 F.2d 387, 394 (C.A. 7, 1940), cert. den. 311 U.S. 706.

⁶ It should be noted that rather than accepting an express invitation to make an offer of proof, counsel for the appellant simply let his own admittedly "broad" remarks while presenting his contentions to the trial court, stand as the appellant's offer of proof (R. 35).

president of the family-owned appellant corporation, and Mr. Walter B. Congdon, appellant's appraiser, the two witnesses giving valuation testimony for the appellant, both testified to a *different* highest and best use for the 100 acres than that on which the appellant bases its claim for severance damages. Thus, counsel for the appellant had himself explained that the proposed unitized use was "to develop and farm the 100 acres across the road" (R. 27). But Mrs. Bandy and Mr. Congdon both testified that the "highest and best use of the 100 acres was for desert home sites" (R. 33).

The correctness of the trial court's result can be shown in another way. The preferred, if not the only correct way, to determine compensation is to estimate the value of the total single tract before the taking and subtract therefrom the value of what remains in the owner after the taking. The difference is compensation including both value of land taken and any diminution in value of remainder. *United States v. Grizzard*, 219 U.S. 180, 185-186 (1911); *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 175 (C.A. 9, 1950), cert. den. 340 U.S. 820. But since appellant claims different highest and best uses for the 100 acres and the 20 acres, that process of valuation is impossible, unified use being a *sine qua non*. This itself disproves the existence of true severance damages.

Particularly appropriate here is the following language by the United States Court of Appeals for the Third Circuit in *Sharpe v. United States*, 112 Fed. 893 at page 896 (which language was approved by the Supreme Court, 191 U.S. 341, 354):

It is not denied that in rendering the "just compensation" secured by the constitution of the United States to the citizen whose property is taken for public uses it is right and proper to include the damages in the shape of deterioration in value which will result to the residue of the tract from the occupation of the part so taken. In applying this rule, however, regard is to be had to the integrity of the tract as a unitary holding by the owner. The holding from which a part is taken for public uses must be of such a character as that its integrity as an individual tract shall have been destroyed by the taking. Depreciation in the value of the residue of such a tract may properly be considered as allowable damages in adjusting the compensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding, and the distinction between the residue of a tract whose integrity is destroyed by the taking and what are merely other parcels or holdings of the same owner, must be kept in mind in the practical application of the requirement to render just compensation for property taken for public uses. *How it is applied must largely depend upon the facts of the particular case and the sound discretion of the court.* All the testimony in this case tends to show the separateness of this tract which was the subject of the condemnation proceedings. It had never been farmed or used in connection with either of the other farms owned by the plaintiff in error. It was in no way reasonably or substantially necessary to the enjoyment of the other two tracts. * * *.

In the instant case, as in the cited one, the tract subject to the condemnation proceeding had never actually been farmed or used in connection with the other acreage owned by the appellant. In the above-cited case the Court of Appeals goes on to point out that the tracts were separated by a public road (112 Fed. at p. 896) a fact of which the Supreme Court also took note (191 U.S. at p. 353).⁷ Here, as in the *Sharpe* case, the practical application of the rule "must largely depend upon the facts of the particular case" (which, of course, are primarily for the District Court to determine) and "the sound discretion of the court", meaning the trial court.⁸

C. *The appellant has been treated well in the instant case:*—Aside from the purely legal reasons why the ruling attacked is correct, it should be noted that from an equitable standpoint the appellant has fared well at the hands of the Government. As the record makes clear, the Government conveyed a 30-foot strip

⁷ In the *Sharpe* case the Court of Appeals concluded that "the other two farms or tracts of land owned by the plaintiff in error constituted such separate and independent parcels as regards the lands in question that they cannot properly be spoken of as the residue of a tract of land from which the land in question was taken." (112 Fed. at p. 897). As noted by the Court of Appeals (*ibid.*), in the factual situation there presented to it, the trial court did allow the plaintiff in error to show what damage, if any, had resulted from separating the farms but refused to allow the plaintiff in error to show other claimed damage or inconvenience from the taking of the tract for military purposes.

⁸ The Supreme Court also took occasion to point out that "what particular items of damage were proper to be considered in relation to the remaining tracts were questions primarily for the trial judge * * *" (191 U.S. at p. 351).

of land to the county "in order that access might be retained to the Bandy Ranch" (R. 34). Indeed, while previous access had been by means of a 20-foot trail (R. 29), the conveyance of the 30-foot strip made possible the construction of a 60-foot road to the appellant's remaining property (R. 34). As counsel for the appellant felt compelled to acknowledge, the effect of the creation of the 60-foot road was to increase the valuation of appellant's remaining property (R. 31). Cf. *Bauman v. Ross*, 167 U.S. 548, 574-575 (1897).⁹

It is perhaps worthy of note that the jury's verdict for tract K-1528 was \$15,000.00 as compared to appraisals by witnesses for the Government in the amount of \$10,000.00 and \$10,500.00 respectively. It may well be that the pumps, pipe, well, etc. which the appellant urges here as the basis for a severance damage claim, were taken into account by the jury in making its award, though not in the form of severance damages as such.

D. "Severance damages", as other damages, must not be based upon speculation:—Since the remarks constituting the offer of proof in the instant case show that the testimony would be as to matters which never got "beyond the stage of planning", and which would, in fact, be in conflict with the adduced testimony on behalf of the appellee as to the highest and best use (R. 32-33), the proffered testimony would in any

⁹ The federal rule is that special benefits to land not taken should be deducted from the award for land taken as well as for severance damages. E.g., *Bauman v. Ross*, 167 U.S. 548, 574, 581-582 (1897); *United States v. Grizzard*, 219 U.S. 180, 184-185 (1911); *Aaronson v. United States*, 79 F.2d 139, 140 (C.A. D.C. 1935), citing numerous authorities.

event have been violative of the rule that testimony in this respect must not be "vague and speculative in character". *Sharpe v. United States*, 112 F.2d 893, 897 (C.A. 3, 1902), affirmed 191 U.S. 341. As there made clear, testimony dealing with "possibilities more or less remote" are not properly to be considered (*ibid.*).

E. *There could be no recovery as to part of the property for which the appellant claims severance damages for another reason:*—The appellant here seeks severance damages alleged to have been caused, in part, to strictly personal property, e.g., pipe which had not been placed in the ground or affixed to real property so as to become even a fixture. Thus it appears that part of the pipe, and perhaps some of the other items, just laid on the uncondemned 20-acre tract for some time and then disposition was made of such material following the abandonment of the project for which it was intended (R. 28-29, 31-32). The appellant seeks the difference between the appraised value and the disposal price (R. 28-29; Br. 3, 6-7). But as shown *supra*, pp. 7-9, the impairment of market value, if any, of the residue of the land taken would be the measure of any possible recovery and the appellant has conceded that no such impairment had occurred (R. 31). It should be noted that appellant's counsel expressly referred to the pipe as being "personal property" (R. 31); and appellant's own authority (Br. 11-12) makes clear that "damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid". 2 Lewis on Eminent Domain (3d ed.), Sec. 728, p. 1277.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the District Court should be affirmed.

Respectfully,

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MAY 1958

No. 15858.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR EARL MCKNIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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APR 14 1958

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TOPICAL INDEX

	PAGE
Preliminary statement	1
Statement of facts and appellant's contentions.....	2
(a) The findings and conclusions of law.....	2
Argument	4

I.

The lower court committed reversible error in determining and finding that the Veterans Administrator suffered a loss in the sum of \$1,453.64.....	4
---	---

II.

The action by the appellee is a proceeding for a deficiency judgment and by reason thereof is barred by the provisions of Section 580(b) of the Code of Civil Procedure of Cali- fornia	7
Conclusion	9

TABLE OF AUTHORITIES CITED

CASES	PAGE
Board of Supervisors v. Simpson, 36 Cal. 2d 671.....	7
Diamond v. Willett, 37 So. 2d 338.....	5
Lathrop, Haskins & Co., In re, 216 Fed. 102.....	5, 6
Lidderdale v. Robinson, 2 Brock 159.....	8
Waldrip v. Black, 74 Cal. 409, 16 Pac. 226.....	8
Wilton-Maxfield Management Co., In re, 117 F. 2d 913.....	9

RULES AND REGULATIONS

Federal Rules of Civil Procedure, Rule 76.....	1
38 Code of Federal Regulations (1946), Sec. 4323(e).....	3, 6

STATUTES

Code of Civil Procedure, Sec. 580(b).....	8, 9
Government Code, Sec. 14.....	7
United States Code Annotated, Title 38, Sec. 636.....	7
United States Code Annotated, Title 38, Sec. 693.....	5
United States Code Annotated, Title 38, Sec. 694(g).....	6, 7

TEXTBOOK

23 California Jurisprudence, p. 917	7, 8
---	------

No. 15858.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR EARL MCKNIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

The appellant Arthur Earl McKnight has appealed from a judgment entered on May 23, 1957, in favor of appellee United States of America in the sum of \$2,027.57.

The appeal is being presented on a settled statement of the case, pursuant to Rule 76 of the Federal Rules of Civil Procedure.

Preliminary Statement.

The appellant, a veteran of World War II, applied for a loan to the Porterville Mutual Building and Loan Association of Porterville, California, and was granted said loan and secured the same for the sole purpose of buying a home. The appellee United States of America guaranteed 50 percent of said loan under the Servicemen's Readjustment Act of 1944.

The appellant defaulted on his note, and the lending agency foreclosed the trust deed. Following the default and foreclosure, the lending agency made a claim upon the appellee by virtue of the Servicemen's Readjustment Act of 1944. The entire controversy concerns the liability, if any, of the veteran to the appellee after the payment made by the appellee to the lending agency.

Statement of Facts and Appellant's Contentions.

The facts appear in the Findings of Fact as set forth in the Transcript of the Record, pages 9 to 14.

The Conclusions of Law appear in the Transcript of the Record, pages 14 to 15.

A reversal of the judgment is necessary, for the lower court made erroneous findings of fact and conclusions of law; the lower court erroneously refused to admit competent, relevant and material evidence and rejected the appellant's offer of proof; the lower court erroneously determined that this was not an action for a deficiency judgment, and as such would be barred under the law of California.

(a) The Findings and Conclusions of Law.

The findings and conclusions of law are erroneous, because legally there was no loss to the appellee. This is true because the appellee took title to the property and resold it to a private person, which wiped out any loss that might be claimed by the appellee, except the sum of \$415.62. This will hereinafter be shown in detail, and the findings and conclusions examined at length, but, basically, it is as follows:

(1) The lower court determined that following the claim of the lender to the appellee the appellee paid the

lender \$3,375.00, which, after sale of the property, the sum of \$1,921.36 was credited to the defendant, resulting in a net loss to the appellee in the sum of \$1,453.64 [Finding of Fact No. 14, Tr. of the Rec. p. 14].

(2) The lower court concluded that by reason of said fact the appellee suffered a loss, at all times, of \$1,453.64, and by reason of the Code of Federal Regulations (1946 Supp.), Title 38, Section 4323, Paragraph (e), the appellant became liable to indemnify the appellee for any loss suffered [Conclusions of Law 3 and 4, Tr. of the Rec. p. 15].

The situation is one where under a veteran's guaranteed loan and following a default by the veteran the lender has made a claim upon the appellee for payment of the loan. The payment is made, the lender sells the property at an upset price established by the appellee, the appellee credits the veteran with the excess sum of the sale over the guaranteed portion of the loan and attempts to recover judgment against the veteran for the so-called "loss" suffered by the appellee. The whole fallacy with the lower court's judgment and conclusions of law is that there is in reality no "loss" because the lender has the right of conveying the property to the appellee, and did so convey it. The appellee may then sell the property and wipe out any "loss" that may have existed.

The exact situation is present in the case at bar, and the argument will show why a reversal is required in order to conform to the law.

ARGUMENT.

I.

The Lower Court Committed Reversible Error in Determining and Finding That the Veterans Administrator Suffered a Loss in the Sum of \$1,453.64.

(The judgment added \$522.03 interest to this principal sum and \$41.90 costs, making a total of \$2,027.57.)

Following the default of the note by the appellant and the foreclosure of the trust deed by the lender and the payment of the claim by the appellee to the lender, the Veterans Administrator acquired the subject property in its own name. The total cost of acquisition of the property was \$7,047.50.

Shortly thereafter, the Veterans Administrator sold the property for a gross price of \$6,850.00, which, after all payment of commissions and fees, resulted in the sum of \$6,631.88 to the Veterans Administrator. The only loss, if any, suffered by the Veterans Administrator was the difference in the cost of acquisition and the amount received at the sale. This amounts to \$415.62.

In the District Court of the United States, the aforementioned facts concerning the cost of acquisition of the property and the amount received at the sale were stipulated to as true by the appellee, but the evidence was rejected by the District Court on the grounds that the same were incompetent, irrelevant and immaterial to the issues [Tr. of the Rec. pp. 5 and 6].

The basis for the judgment for the appellee is in Conclusions of Law Nos. 3 and 4, wherein the lower court concluded that the Veterans Administrator paid out, suffered a loss of and at all times thereafter continued to

suffer a loss of the sum of \$1,453.64. *The simple facts show this is not true.* It needs no citation of authority to show that the Veterans Administrator would not be entitled to make a profit upon the default by a veteran of his family home. The very purpose of the Serviceman's Readjustment Act of 1944 was to aid the returning veteran in the readjustment of his normal family life. Title 38, U. S. C. A., Section 693, is designed to give relief to members of the armed forces of limited means who honorably served their country during World War II (*Diamond v. Willett* (La. App., 1948), 37 So. 2d 338).

Separately from the foregoing and independent of said ground, in Conclusion of Law No. 4 the lower court concluded that pursuant to the Code of Federal Regulations (1946 Supp.), the appellant became liable to indemnify the Veterans Administrator for any loss under the Servicemen's Readjustment Act of 1944.

In this regard, the lower court completely and erroneously misapplied the law, both as to the measure of damages and the law of indemnity. Under the law of indemnity, the only damage to the appellee would be the net loss suffered. The net loss suffered would be the difference between the cost of acquisition of the property and the amount received from the sale.

In *In re Lathrop, Haskins & Co.*, 216 Fed. 102, the United States Court of Appeals correctly states the measure of damages for a contract of indemnity as follows:

“ . . . the measure of damages in contracts of indemnity is not the amount of liability incurred, but the amount actually paid by the person indemnified on account of the loss. See *Central Trust Co. v. Louisville Trust Co.*, 100 Fed. 545, 546, 40 C.

C. A. 530, 531 (1900); the court through Mr. Justice Lurton, after citing *Wicker v. Hoppock*, 6 Wall. 94, 18 L. Ed. 752 (1867), *Mills v. Dows*, 133 U. S. 424, 10 Sup. Ct. 413, 33 L. Ed. 717 (1890), and *Johnson v. Risk*, 137 U. S. 300, 308, 11 Sup. Ct. 111, 34 L. Ed. 683 (1890), says:

“‘These cases emphasize the distinction between a covenant to pay and one to indemnify, and hold that an action will lie for a breach of a covenant to pay before actual payments by the plaintiff, but not upon a mere covenant of indemnity, until the plaintiff has actually sustained loss or damage.’”

In re Lathrop, Haskins & Co., 216 Fed. 102, 106, 107.

It is thus clear that when a proper application of the law is made to the stipulated and agreed facts, the lower court was in error in refusing the offer of proof as to the cost of the acquisition of the property by the appellee and the amount received at the sale. When the evidence has been correctly received, the result is that the net loss to the appellee is \$415.62.

There is no statutory authority for the regulation relied upon in Conclusion of Law No. 4 (38 C. F. R. (1946), Sec. 4323(e)). That regulation is not consistent with the law as stated in Title 38, U. S. C. A., Section 694(g).

The law (38 U. S. C. A., Sec. 694(g)) states in substance that in the event of default the administrator shall be subrogated to the rights of the holder of the obligation. The exact text is set forth later in this brief. The regulation relied upon by the appellant states in substance that any amounts paid by the administrator on account of the liabilities of any veteran guaranteed or

insured under the provisions of the Act shall constitute a debt owing to the United States by such veteran. Other than a publication in the Federal Register, the appellant can find no authority at all for this regulation. It violates the purpose of the Servicemen's Readjustment Act of 1944.

II.

The Action by the Appellee Is a Proceeding for a Deficiency Judgment and by Reason Thereof Is Barred by the Provisions of Section 580(b) of the Code of Civil Procedure of California.

In Title 38, U. S. C. A., Section 694(g), appears the procedure on default. It states:

"In the event of default in the payment of any loan guaranteed under this subchapter, the holder of the obligation shall notify the administrator who shall thereupon pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty: . . ."

Title 38, U. S. C. A., Secs. 694(g), 636.

The wording is very clear and unambiguous. The administrator shall be subrogated to the rights of the holder of the obligation. "Shall" has been defined to be mandatory and not directory (Cal. Gov. Code, Sec. 14; *Board of Supervisors v. Simpson*, 36 Cal. 2d 671, 676).

"Subrogation" is defined in 23 Cal. Jur., page 917, as follows:

"In its broadest sense, subrogation is the substitution of one person in the place of another, whether as creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the

rights of the other in relation to the debt or claim and its rights, remedies or securities. It is 'a sort of assignment by operation of equity,' and grew up out of the doctrine of assignment of causes of action."

23 Cal. Jur., p. 917.

In *Waldrip v. Black*, 74 Cal. 409, 16 Pac. 226, it was held that when a person—not a volunteer—has paid money for which others were responsible, the claim thereby given him on those who were so responsible is clothed with the legal garb with which the contract he has discharged was vested, and he is substituted, to every equitable extent and purpose, in the place of the creditor whose claim he has discharged.

This was apparently the reasoning of Chief Justice Marshall in *Lidderdale v. Robinson*, 2 Brock 159.

In California, at all times mentioned herein, there was in full force and effect Section 580(b) of the Code of Civil Procedure, which section reads as follows:

"No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property."

Code Civ. Proc. Sec. 580(b).

The Findings of Fact reveal that the note and loan was secured by a deed of trust on real property and was made for the purpose of the defendant's purchasing said real property [Finding of Fact No. 3, Tr. of the Rec. p. 10].

The lender would have no cause of action against the purchaser of the real property for a deficiency judg-

ment by reason of Section 580(b) of the Code of Civil Procedure. The Veterans Administrator is subrogated to the rights of the lender. He has no greater right than the lender. The Veterans Administrator, therefore, has no cause of action against the lender, and the motion to dismiss the complaint should have been granted.

An application of Section 580(b) of the Code of Civil Procedure of California has been made and used in Federal bankruptcy courts (see *In re Wilton-Maxfield Management Co.*, 117 F. 2d 913, 914, 915).

Conclusion.

From an examination of the entire record, it is apparent that the lower court has misconstrued the application of the Servicemen's Readjustment Act of 1944, as amended. They have placed the burdens upon the veteran rather than apply the spirit and letter of the Act. Separately, the lower court has erroneously determined that the appellee suffered a loss, and if the action is maintainable at all, which action your appellant respectfully submits is barred by reason of the deficiency judgment prohibition in California and the motion to dismiss should have been granted and the judgment should be reversed.

Respectfully submitted,

ROBERT H. GREEN,

Attorney for Appellant.

No. 15853

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BEACHER GEORGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

SEP 10 1958

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TOPICAL INDEX

	PAGE
I.	
Jurisdictional statement	1
II.	
Statement of the case.....	2
III.	
Argument.....	3
A. The evidence received on trial was substantial and sufficient to support the judgment of conviction.....	3
B. The admonitions of court to counsel during the course of trial were not prejudicial to the defense.....	7
C. The imposition of a term of imprisonment within the statutory bounds set by Congress is within the discretion of the trial judge.....	9
IV.	
Conclusion	9

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Brown v. United States, 222 F. 2d 293.....	7, 9
Callahan v. United States, 35 F. 2d 633.....	8
Coupe v. United States, 113 F. 2d 145.....	8
Federick v. United States, 163 F. 2d 536.....	8
Goldstein v. United States, 63 F. 2d 609.....	8
Gore v. United States, No. 668 (S. Ct., June 30, 1958).....	9
John E. Smith's Sons Co. v. Latimer Foundry & Machinery Co., 19 F. R. D. 379.....	8
Kettenbach v. United States, 202 Fed. 377.....	8
Norwood v. Great American Indemnity Co., 146 F. 2d 797.....	8
Pasadena Research Laboratories v. United States, 169 F. 2d 375, cert. den. 335 U. S. 853.....	4
United States v. Angelo, 153 F. 2d 247.....	8
United States v. Katz, 173 F. 2d 116.....	8
Woodward Laboratories, Inc. et al. v. United States, 198 F. 2d 995	4

STATUTES

United States Code, Title 18, Sec. 3231.....	2
United States Code, Title 21, Sec. 174.....	1, 7, 9
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1294.....	2

No. 15853

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BEACHER GEORGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

This is an appeal from the judgment of the United States District Court for the Southern District of California which adjudged appellant guilty under each count of a five-count Indictment returned by the Grand Jury for the Southern District of California on March 20, 1957, which Indictment was brought under the provisions of Section 174 of Title 21, United States Code [Clk. Tr. pp. 2-4, 10-11].

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California [Clk. Tr. pp. 2-4].

The jurisdiction of the District Court is based upon Section 3231, Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the proceedings leading to said judgment by reason of the provisions of Section 1291 and 1294 of Title 28, United States Code.

II.

Statement of the Case.

The Indictment in this matter was returned March 20, 1957 [Clk. Tr. p. 4] in five counts, essentially charging the appellant with selling and facilitating the sale of certain quantities of heroin after said heroin was unlawfully imported, which unlawful importation was known to said appellant; and as to each of said sales, the dates, amounts of heroin and purchasers are as follows:

Count One: October 4, 1956, 99 grains sold to Dorothy Smith;

Count Two: November 1, 1956, 83 grains sold to Justin Burley;

Count Three: December 14, 1956, 348 grains sold to Malcolm P. Richards;

Count Four: January 4, 1957, 312 grains sold to Justin Burley;

Count Five: January 17, 1957, 185 grains sold to Justin Burley. [Clk. Tr. pp. 2-4.]

The appellant was arraigned on April 1, 1957, and on April 8, 1957, entered his plea of not guilty to each of the five counts of the Indictment [Clk. Tr. pp. 5, 18]; on May 7, 1957, trial was commenced before a jury, the Honorable Wm. C. Mathes, United States District

Judge, presiding [Clk. Tr. p. 18]; on May 15, 1957, the jury returned a verdict of guilty as to all five counts, which was then filed [Clk. Tr. p. 18].

On May 27, 1957, the trial judge sentenced the appellant to the custody of the Attorney General for imprisonment for a period of twenty years and to pay a \$5,000 fine on Count One, the appellant to stand committed until the fine was paid or he was otherwise discharged; for imprisonment for twenty years on Count Two; said twenty-year sentences on Counts One and Two to commence and run concurrently; for imprisonment for twenty-years on Count Three; twenty years on County Four; twenty years on Count Five; the said twenty-year sentences imposed under Counts Three, Four and Five to commence and run consecutively to the time imposed on Counts One and Two and consecutively to each other, for a total period of imprisonment of eighty years [Clk. Tr. pp. 8-11].

Notice of Appeal was filed on June 7, 1957 [Clk. Tr. p. 12].

For the purpose of brevity, the facts pertinent to each of the counts will be discussed in the Argument relative to the sufficiency of the evidence to sustain the conviction.

III.

Argument.

A. The Evidence Received on Trial Was Substantial and Sufficient to Support the Judgment of Conviction.

It is axiomatic that an appellate court will not resolve conflicts in the evidence nor pass upon credibility of witnesses who appeared at trial, and that this Court will consider the evidence and all the fair and reasonable inferences that flow therefrom from the aspect most

favorable to supporting the verdict of the jury and the judgment of conviction.

Woodward Laboratories, Inc. et al. v. United States, 198 F. 2d 995, 998 (9 Cir., 1952);

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9 Cir., 1948); cert. den. 335 U. S. 853.

It is patent from appellant's Brief that the evidence was sufficient to support each of the counts of the Indictment when the foregoing test is kept in mind. Furthermore, appellant has apparently abandoned this point in his Argument (see p. 11 of Appellant's Br.) where he asserts only that there were discrepancies in the testimony of witness Smith in respect to the transaction covered by Count One, there being no argument with respect to insufficiency of the evidence as to any other count. Nor has appellant elsewhere in his Brief shown what, if any, element of any of the offenses charged failed of proof.

Set forth below are the barest essentials of the evidence adduced on trial relative to each of the counts of the Indictment.

According to the testimony of the purchasers involved in each of the five counts of this Indictment, the following facts appear of record. On October 4, 1956, a special employee by the name of Thomas, in the company of Deputy Sheriff Smith, asked the appellant to sell some narcotics—\$100 worth. The appellant asked Thomas and Smith to meet him at 89th and McKinley in Los Angeles fifteen minutes later, where Smith delivered to the Appellant \$100 in cash. Immediately thereafter the appellant

asked Smith to wait while he showed Thomas where the narcotics were located which he, appellant, did, pointing at a package on the street, which Thomas picked up and handed to Smith [Rep. Tr. pp. 31-34].

Although there is some discrepancy in respect to the initialing of the package by Smith, it appears that the exhibit produced in court was the same package retrieved from the street, and this was definitely the package handed to Agent Richards some five minutes later on the same day [Rep. Tr. pp. 50-51, 123-124; Ex. 1B1].

As to Count Two, Justin Burley, a Deputy Sheriff, Los Angeles County, in the company of Thomas, met appellant on the street in Los Angeles on November 1, 1956, where Thomas was observed to converse with the appellant. Thereafter, pursuant to a conversation with Thomas, Burley left \$100 in cash on the sidewalk which he later observed a small boy pick up and hand to the appellant [Rep. Tr. pp. 53-57]. A telephone call by appellant was received thereafter in which Thomas was advised as to the location of a package of heroin which was picked up by Thomas and Burley [Rep. Tr. pp. 57, 59, 133-134].

As to Count Three, Thomas called the appellant on December 14, 1956, to arrange for payment and delivery of the heroin [Rep. Tr. pp. 138-139], and thereafter \$250 was delivered to the appellant by dropping it in the street [Rep. Tr. p. 143]. Shortly thereafter arrangements were made by 'phone between Thomas and appellant for the delivery of the heroin which was found in a washroom, pursuant to instructions given by the appellant [Rep. Tr. pp. 144-145].

Under the charge of Count Four, evidence was produced which showed that Deputy Sheriff Burley and Thomas saw the appellant on January 4, 1957, at his cafe where, inferentially, Thomas delivered \$240 which he had received from Burley to the appellant, and later was observed to deliver an additional \$10 to the appellant [Rep. Tr. pp. 61-64]. Thereafter Burley and Thomas left and later returned to the cafe where conversation ensued between Thomas and appellant, the appellant advising that the narcotics could be picked up from a hollow base of a tree, which narcotics were recovered by Deputy Sheriff Burley [Rep. Tr. pp. 65-68].

As to Count Five, Deputy Sheriff Burley saw the appellant on January 17, 1957 while with Thomas. A conversation occurred about the price being paid by Burley for the purchase of narcotics, which is clearly incriminatory. In this conversation arrangements were made for Burley and appellant to consummate another purchase [Rep. Tr. pp. 71-76]. Later in the day appellant delivered a package to Burley by throwing it into the car in which Burley was seated [Rep. Tr. pp. 80-82]. For this delivery appellant was paid \$150 [Rep. Tr. pp. 112-113].

The purchaser's testimony, which is set forth in the briefest essence above, was corroborated in all observable details by Agent Richards of the Federal Bureau of Narcotics, Sergeant Landry, Deputy of the Los Angeles County Sheriff's Department and Deputy Sheriff Farrington (reference is made to their testimony as indexed in the transcript).

As a rebuttal witness, the special employee Thomas testified substantially the same as the purchasers in respect to each of the above transactions.

The contents of all packages recovered were by stipulation shown to have been heroin [Rep. Tr. pp. 197-198].

In some instance, the possession of narcotics is shown by direct evidence to have been in the possession of the accused. In other instances, the strongest inferences of constructive possession are shown by the record. This is sufficient to invoke the presumption of unlawful importation and knowledge thereof as set forth in the statute.

21 U. S. C., Sec. 174.

In *Brown v. United States*, 222 F. 2d 293 at 297, this court said:

“In *Mullaney v. United States*, 9 Cir., 1936, 82 F. 2d 638, 642, this court approved an instruction of the trial court that ‘possession of a thing means having in one’s control or under one’s dominion.’ It is not necessary that possession be immediate or exclusive. *Mullaney v. United States*, supra; *Borgfeldt v. United States*, 9 Cir., 1933, 67 F. 2d 967.”

The other elements of the offenses as charged, *i.e.*, sale or facilitation of sale, were shown directly by the evidence.

B. The Admonitions of Court to Counsel During the Course of Trial Were Not Prejudicial to the Defense.

The portion of the remarks occurring under this subject quoted by appellant is not complete. The Court is asked to read them in their entirety as they appear in the Reporter’s Transcript at pages 107-108.

It would appear from the record that counsel’s conduct was a continuing proposition up to this time since an earlier admonition occurs in the Reporter’s Transcript at page 48.

Nowhere in the record does it appear that appellant’s counsel was unduly restricted in his movements or at-

titude; nor has appellant pointed out any specific instances in which his defense was hindered or prejudiced by the court's admonition. Clearly the matter did not affect the jury's deliberations since the admonition complained of occurred in their absence [Rep. Tr. p. 107]. The admonition contains in it findings of fact as to the apparent misconduct of counsel. Under these circumstances it was the court's duty to preclude the influence of personality upon the jury.

Federick v. United States, 163 F. 2d 536, 547 (9 Cir., 1947);

Kettenbach v. United States, 202 Fed. 377, 385 (9 Cir., 1913);

Callahan v. United States, 35 F. 2d 633 (10 Cir., 1929);

Coupe v. United States, 113 F. 2d 145, 149 (D. C. Cir. 1940);

John E. Smith's Sons Co. v. Latimer Foundry & Machinery Co., 19 F. R. D. 379, 390 (U. S. D. C., Pa., 1956);

Norwood v. Great American Indemnity Co., 146 F. 2d 797, 800 (3 Cir., 1944);

Goldstein v. United States, 63 F. 2d 609 (9 Cir., 1933);

United States v. Katz, 173 F. 2d 116 (3 Cir., 1949);

and compare:

United States v. Angelo, 153 F. 2d 247, 251 (3 Cir., 1946).

Appellee has no quarrel with cases cited by appellant as to the necessity of counsel, but points out to this Court

that it must first be *demonstrated* that there was some infringement on trial with the functioning of counsel, which is not shown here.

C. The Imposition of a Term of Imprisonment Within the Statutory Bounds Set by Congress Is Within the Discretion of the Trial Judge.

Appellant cites no cases in support of his position that the sentence was unduly severe or unreasonable. This matter was recently before this Court, and it was held that such a matter is within the discretion of the trial judge and not reviewable by the appellate court so long as the sentence fell within the bounds prescribed by statute.

Brown v. United States, 222 F. 2d 293, at 298 (9 Cir., 1955), and cases there cited.

And compare the recent decision of *Gore v. United States*, decided by the Supreme Court on June 30, 1958, being No. 668; Title 21, United States Code, Section 174.

IV.

Conclusion.

That there is sufficient and substantial evidence to support the conviction; that there was no prejudice to the defense; and that the sentence imposed by the court was within the limits of the statute and discretionary with the trial judge is respectfully submitted.

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No. 15,854

In the
United States Court of Appeals
For the Ninth Circuit

HAL GILFLEN,

Appellant,

VS.

CITY OF SEWARD, a Municipal Corporation,

Appellee.

Brief of Appellee

Appeal from the District Court for the
District of Alaska, Third Division

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FILED

AUG 28 1958

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SUBJECT INDEX

	Page
Preliminary Statement	1
Facts	1
As a Matter of Law Defendant Owed Plaintiff No Duty to Remove the Accumulation of Ice and Snow on Which Plain- tiff Slipped	2
(1) The accumulation of ice and snow was the product of weather conditions and pedestrian use of the sidewalk....	3
(2) A city is under no duty to remove snow and ice accumu- lated by weather conditions and pedestrian use of the sidewalk	4
Plaintiff's Contentions	7
Plaintiff Assumed the Risk and Was Contributorily Negligent as a Matter of Law.....	9
Conclusion	10

TABLE OF AUTHORITIES CITED

CASES	Pages
Berger v. Salt Lake City, 191 P. 233 (Utah 1920).....	6
Casper v. City of Chicago, 50 NE 2d 858 (Ill. 1943).....	4, 6
City of Norwalk v. Tuttle, 76 NE 617 (Ohio 1906).....	9
Cronin v. Brownlie, 109 NE 2d 352 (Ill. 1952).....	9
Dapper v. City of Milwaukee, 82 NW 725 (Wisc. 1900).....	5
Hatch v. City of Elmira, 126 NYS 863 (1911).....	5
Hyer v. City of Janesville, 77 NW 729 (Wisc. 1898).....	5
Johnson v. City of Evansville, 180 NE 600 (Ind. 1932).....	6
Johnson v. Town of Orange, 69 NE 2d 587 (Mass. 1946).....	4
McAffee v. United States, 111 F.2d 199 (CADC 1940).....	4
McCave v. City of Canton, 42 NE 2d 762 (Ohio 1942) at p. 764	4
Mills v. City of Springfield, 142 NE 2d 859 (Ohio 1956).....	9, 10
Reedy v. St. Louis Brewing Assn., 61 SW 859, 862 (Mo. 1901)	5
Ritgers v. City of Gillespie, 113 NE 2d 215 (Ill. 1953).....	9
Smith v. City of Cuyahoga Falls, 53 NE 2d 670 (Ohio 1943)...	9
Steele v. City of Chippewa Falls, 258 NW 181 (Wisc. 1935)...	4, 5
Stieb v. City of Chicago, 104 NE 2d 112 (Ill. 1952).....	5
Strappelli v. City of Chicago, 20 NE 2d 43, 44 (Ill. 1939).....	4, 5, 6
Thomas v. City of Appleton, 40 NW 2d 575 (Wisc. 1949).....	5
Trumbly v. City of Chicago, 80 NE 2d 453 (Ill. 1948).....	5
Vonkey v. City of St. Louis, 117 SW 733 (Mo. 1909).....	5
Wilson v. City of Idaho Falls, 105 P. 1057 (Idaho 1909).....	6

TEXTS

20 Am. Jur. Evidence Section 71.....	4
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Brief of Appellee

Appeal from the District Court for the
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PRELIMINARY STATEMENT

This is a case in which plaintiff seeks to impose upon defendant the burden of removing ice and snow from the sidewalks of Seward, Alaska. This imposition is contrary to both common sense and the law.

No Alaskan statute or judicial decision imposes such a burden. And the District Court in this action determined that defendant had no such burden. We will show the Court that this determination was correct.

FACTS

Plaintiff was injured when he slipped and fell on an accumulation of ice and snow on a sidewalk in Seward,

Alaska.¹ Plaintiff was then walking between two businesses which he owned.² It was approximately 8:00 o'clock in the evening and the temperature was freezing.³ The fall occurred on a portion of the sidewalk adjacent to a vacant lot.⁴

Plaintiff filed this action, claiming that defendant was liable for the ice and snow.⁵ Plaintiff alleged that snow and ice had accumulated and was unsafe.⁶ Plaintiff's deposition was taken and he testified to the condition of the ice and snow.⁷

On the pleadings and plaintiff's depositions, defendant moved for summary judgment.⁸ The question of law was briefed and argued. The District Court determined that there was no genuine issue as to any material fact and that, as a matter of law, defendant owed plaintiff no duty to keep the sidewalk free of ice and snow.⁹ Judgment was entered for defendant.¹⁰

We will show the Court that this judgment was correct: As a matter of law, defendant owed plaintiff no duty to remove the accumulation of ice and snow on which plaintiff slipped.

AS A MATTER OF LAW DEFENDANT OWED PLAINTIFF NO DUTY TO REMOVE THE ACCUMULATION OF ICE AND SNOW ON WHICH PLAINTIFF SLIPPED.

Defendant owed plaintiff no duty because: (1) the accumulation of ice and snow was the product of weather con-

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1. TR. p. 4.
 2. TR. pp. 10-11.
 3. TR. pp. 4, 11, 14.
 4. TR. pp. 10-11.
 5. TR. p. 4.
 6. TR. p. 4.
 7. TR pp. 14, 15.
 8. TR. p. 44.
 9. TR. pp. 48-49.
 10. TR. pp. 49-50.

ditions and pedestrian use of the sidewalk, and (2) a city is under no duty to remove snow and ice so accumulated.

(1) The accumulation of ice and snow was the product of weather conditions and pedestrian use of the sidewalk.

The record shows that the accumulation was the product of snowfall, freezes, thaws, and the trampling of the ice and snow by pedestrians.

Plaintiff alleged that “snow and ice had accumulated” and that the accumulation was “in an irregular shape; was packed and frozen, and so elevated, uneven, and ridged as to afford an insecure footing”.¹¹ In his deposition, plaintiff similarly testified to the nature of the ice and snow.¹²

It is important to note that neither the complaint nor the deposition charged any *defect* in the sidewalk contributing to the accumulation. Nor was there any charge that the city, or any other persons, had placed the ice and snow on the sidewalk.

Plaintiff slipped adjacent to a vacant lot.¹³ The accumulation could not, therefore, have been caused by any defect such as overhanging eaves or leaking drains.

The accumulation could only have resulted from weather conditions and pedestrians’ use of the sidewalk. The record compels this conclusion.

Plaintiff’s testimony shows that the snow and ice had accumulated because snow had fallen “all winter long” and “the sidewalk had not been cleaned all season”.¹⁴

Plaintiff added that the slickness of the pack was caused by the warming of the weather.¹⁵ This conclusion was sup-

11. TR. p. 4.

12. TR. pp. 14, 15.

13. TR. pp. 10-11.

14. TR. p. 14.

15. TR. p. 15.

ported by climatological data which defendant submitted to the District Court.¹⁶ This data showed that the temperature during the period preceding plaintiff's accident varied a few degrees above and below freezing. This produced an alternate thawing and freezing.

Plaintiff indicated that other pedestrians had used the sidewalk.¹⁷ Trampling of the snow pack by pedestrians, together with alternate thawing and freezing, produced the uneven accumulation of ice and snow to which plaintiff testified; *Strappelli v. City of Chicago*, 20 NE 2d 43, 44 (Ill 1939).

(2) A city is under no duty to remove snow and ice accumulated by weather conditions and pedestrian use of the sidewalk.

There is no statute in Alaska which imposes upon cities the burden of removing ice and snow from sidewalks. Nor has any Alaskan judicial decision imposed such a burden.

The jurisdictions of the United States uniformly recognize that, in absence of some defect in the sidewalk, cities are not required to remedy conditions resulting from the fall of snow and its subsequent thaws and freezes; e.g., *Casper v. City of Chicago*, 50 NE 2d 858 (Ill. 1943); *Johnson v. Town of Orange*, 69 NE 2d 587 (Mass 1946); *Steele v. City of Chippewa Falls*, 258 NW 181 (Wisc 1935).

The reason for this rule of law is obvious. It would be an impossible burden for cities with heavy snowfalls to keep their miles of sidewalks free of ice and snow. As stated in *McCave v. City of Canton*, 42 NE 2d 762 (Ohio 1942) at p. 764:

"The reason for the rule above stated is that a municipality should not be required by law to remove from

16. Such data is a proper subject of judicial notice; *McAffee v. United States*, 111 F.2d 199 (CADC 1940); 20 Am. Jur. *Evidence* Section 71.

17. TR. pp. 14, 15-16.

the miles of sidewalks within its limits the natural accumulation of ice and snow, because such a requirement is impractical from the nature of things, and when these conditions exist they are generally obvious so that travelers know of them and assume the risk."

Plaintiff concedes that cities are not liable for accumulations brought about by weather conditions.¹⁸ But plaintiff contends that cities should be liable if this ice and snow is trampled by pedestrians.

This contention was rejected by the District Court. The Court determined that Alaskan cities should not be obligated to clear their sidewalks simply because pedestrians have contributed to an uneven packing of the ice and snow.

This determination is supported by many decisions. The following cases hold *as a matter of law* that cities are not obligated to remove ice and snow which has been packed into uneven shape by pedestrians:

Strappelli v. City of Chicago, 20 NE 2d 43 (Ill. 1939);
Trumbly v. City of Chicago, 80 NE 2d 453 (Ill. 1948);
Stieb v. City of Chicago, 104 NE 2d 112 (Ill. 1952);
Steele v. City of Chippewa Falls, 258 NW 181 (Wisc. 1935);

Thomas v. City of Appleton, 40 NW 2d 575 (Wisc. 1949);

Hyer v. City of Janesville, 77 NW 729 (Wisc. 1898);
Hatch v. City of Elmira, 126 NYS 863 (1911);

Dapper v. City of Milwaukee, 82 NW 725 (Wisc. 1900);

Reedy v. St. Louis Brewing Assn., 61 SW 859, 862 (Mo. 1901);

Vonkey v. City of St. Louis, 117 SW 733 (Mo. 1909);

18. App. Br. p. 38, 11. 4-8.

Wilson v. City of Idaho Falls, 105 P. 1057 (Idaho 1909);

Johnson v. City of Evansville, 180 NE 600 (Ind. 1932);

Berger v. Salt Lake City, 191 P. 233 (Utah 1920).

Casper v. City of Chicago, 50 NE 2d 858, 859 (Ill. 1943):

“The law is that where the accumulation of ice and snow is from natural causes, although by usage it is uneven and in hillocks, the city is not liable.”

The District Court’s determination of the law for Alaska is also supported by the reason of practicality. This is ably expressed in *Berger v. Salt Lake City*, 191 P. 233 (Utah 1920) at pp. 237-240. A similar statement is found in *Strappelli v. City of Chicago*, 20 NE 2d 43 (Ill. 1939) at p. 44:

“Snow when trampled upon by many pedestrians and when subjected to alternate thawing into slush and freezing forms itself, when frozen hard, into irregular mounds which become slippery and difficult at times to walk upon. This condition is general during wintertime throughout Illinois. * * * this prevalent condition produces the reason of necessity which underlies the rule exempting cities in this latitude from liability for injuries on city streets and sidewalks, when the presence of snow and ice is the result of natural causes.”

The reasoning expressed in the *Berger* and *Strappelli* cases is particularly applicable to Alaskan cities.

Plaintiff has cited cases which reached a contrary result.¹⁹ Those cases which are based upon *statutes* imposing a duty upon the city are not in point. Alaska, with its heavy snow-fall, has no such statute. The balance of plaintiff’s cases are based upon incorrect reasoning and should not apply to Alaska.

19. App. Br. pp. 38-39.

There is no reason to distinguish between accumulations resulting solely from weather, for which a city is admittedly *not* liable, and those resulting from weather and pedestrians. The *reason* for no liability exists in both situations: the impracticality of forcing a city to keep its miles of sidewalks free from snow, which in the case of Alaska might fall continuously for days. The fallacy of the asserted distinction is evident from the fact that sidewalks are *for the use* of pedestrians, and all ice and snow on sidewalks is certain to be trampled by pedestrians in a short period of time. To state that a city is *not* liable for weather accumulation on sidewalks, but *is* liable when pedestrians *use* those sidewalks is an absurdity. Further, there is no difference in the danger to pedestrians; the danger of falling on smooth ice and snow is as great as that of falling on ice and snow which has been trampled and packed.

Putting upon defendant, and the other cities of Alaska, the burden of cleaning their sidewalks of snow and ice involves considerations of climate and municipal finance which are properly for the legislature. The legislature has not seen fit to impose such a burden. And the District Court declined to substitute its judgment for the legislature's. The decision was correct.

PLAINTIFF'S CONTENTIONS

Defendant will now consider plaintiff's arguments and will show the Court that they are insufficient to compel reversal.

Plaintiff's first point is that the District Court should not have granted summary judgment if there was a genuine issue as to any material fact.²⁰ Plaintiff is correct. However,

20. App. Br. pp. 16-34.

there is no such factual issue in this case. It is clear from the pleadings, depositions, and briefs that the ice and snow was the result of weather plus pedestrians use. The only question was one of *law*: whether or not defendant had a duty to remove such ice and snow. The District Court correctly determined that, as a matter of law, defendant had no such duty.

Plaintiff states that whether or not an accumulation is "natural" is a question of fact.²¹ This is true when there is a question as to (1) whether there was in fact an accumulation, and (2) how it was formed. But there are no such questions in this case. The accumulation of ice and snow existed, and was caused by weather and pedestrians.

Nor does plaintiff's recitation of issues²² raise any questions of fact. Even adopting all inferences favorable to plaintiff, defendant was as a matter of law under no duty to remove the ice and snow.

Plaintiff says that defendant could shift the burden of removing snow and ice to the adjacent landowners.²³ But this is not true. An ordinance requiring the landowners to clear their sidewalks would not relieve the city of any liability imposed upon it.²⁴ And if the courts were to impose liability upon the city such an ordinance would not relieve the city of the burden of inspecting and clearing the sidewalks, and maintaining crews and equipment to do the work. The *reason* for the rule of non-liability would still be present.

In spite of plaintiff's contentions, two points remain: (1) the ice and snow was the result of weather and pedestrian

21. App. Br. p. 38.

22. App. Br. pp. 36-37.

23. App. Br. p. 35.

24. A.C.L.A. Sect. 16-1-90 would allow the city only to charge the landowners for removal.

use, and (2) defendant was under no duty to remove such ice and snow. The decision by the District Court as to the law applicable to Alaska is supported by the law and reason. That decision should be affirmed.

**PLAINTIFF ASSUMED THE RISK AND WAS CONTRIBUTORILY
NEGLIGENT AS A MATTER OF LAW.**

Even if defendant were under a duty to remove the accumulation, the judgment of the District Court should be affirmed. Plaintiff as a matter of law assumed the risk and was contributorily negligent.

Plaintiff testified that the accumulation had been there all winter and that he knew of it.²⁵ He was well acquainted with the condition of the accumulation, having crossed it every day.²⁶ The condition of the ice and snow was plainly visible to plaintiff.²⁷ Plaintiff said he knew of at least one person who had fallen there before his accident.²⁸

It has been held that when a person knows of the icy condition of a sidewalk, and chooses to cross it anyway, he *as a matter of law* assumed the risk and is contributorily negligent.

Mills v. City of Springfield, 142 NE 2d 859 (Ohio 1956);

Ritgers v. City of Gillespie, 113 NE 2d 215 (Ill. 1953);

Cronin v. Brownlie, 109 NE 2d 352 (Ill. 1952);

Smith v. City of Cuyahoga Falls, 53 NE 2d 670 (Ohio 1943);

City of Norwalk v. Tuttle, 76 NE 617 (Ohio 1906).

Plaintiff argues that an issue of fact is presented because the other alternative routes may also have been dangerous.

25. TR. p. 14.

26. TR. p. 14.

27. TR. p. 15.

28. TR. p. 16.

But plaintiff assumed the risk and was contributorily negligent *even if* there were no safer routes; *Mills v. City of Springfield*, 142 NE 2d 859, 867 (Ohio 1956).

CONCLUSION

The accumulation of ice and snow was not caused by any defect in the sidewalk or by any act of defendant. It was the product of weather and pedestrian use. The District Court determined that, in the absence of a statute, Alaskan cities had no duty to remove such ice and snow. This determination is supported by case authorities, reason and common sense. Such a duty is for the legislature to impose.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Dated at San Francisco, California

August 28, 1958.

Respectfully submitted,

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No. 15,854

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Appeal from the District Court for the
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JUL - 3 1958

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Subject Index

	Page
Jurisdictional statement	1
Statement of the case.....	2
Statement of the facts.....	6
Issues presented	15
Argument	16
1. Where there are genuine issues of fact material to the claim for relief, it is error to grant defendant's motion for summary judgment based upon the pleadings and plaintiff's testimony at an oral deposition.....	16
2. The District Court erred in finding as a matter of fact, and ruling as a matter of law, that based upon the record presented, without trial, there was no negligence on the part of appellee, (defendant below), because the accumulation of snow and ice upon appellee's sidewalk which caused appellant's injury was "natural" in character; that appellant (plaintiff below) was guilty of contributory negligence; and had assumed the risk of his injuries, when he ventured upon the obstructed sidewalk with knowledge of its condition	34
Conclusion	50

Table of Authorities Cited

Cases	Pages
Alamosa v. Johnson, (Colo., 1936), 60 P.2d 1087.....	42
Alaska Treadwell Gold Mining Co. v. Mugford, (CCA 9th, 1921), 270 F. 735.....	48
Anderson v. City of St. Cloud, (Minn., 1916), 158 NW 417	38
Arenas v. United States, (1944), 322 US 419, 64 S.Ct. 1090, 88 L.ed. 1363	19
Arnstein v. Porter, (CCA 2d, 1946), 154 F.2d 464.....	18
Avrick v. Rockmont Envelope Co., (CCA 10th, 1946), 155 F.2d 568	28, 29
Barrett v. Canton, (Mo., 1936), 93 SW 2d 927.....	42
Beane v. St. Joseph, (Mo., 1922), 240 SW 840.....	37
Boyd v. Duluth, (Minn., 1925), 204 NW 562.....	39
Brittain v. City of Minneapolis, (Minn., 1957), 84 NW 2d 646	48
Brown v. White, (Pa., 1903), 55 A. 848.....	44, 47
Buffalo v. Des Moines, (Ia., 1922), 186 NW 844.....	40
Bull v. Spokane, (Wash., 1907), 89 P. 555, 13 LRA (NS) 1105	41
Buttmi v. New York, (N.Y., 1931), 254 N.Y.S. 282.....	39
Byington v. Merrill, (Wis., 1901), 88 NW 26	41
Campana Corp. v. Harrison, (CCA 7th, 1943), 135 F.2d 334	24
Carr v. City of Anchorage, (CA 9th, 1957), 243 F.2d 482	32
Chappell v. Goltsman, (CA 5th, 1950), 186 F.2d 215.....	24
Cloughessey v. Waterbury, (Conn., 1884), 50 Am. Rep. 38	38
Coffin v. Palmer, (Mass., 1894), 38 NE 509.....	47
Collins v. City of Council Bluffs, (Ia., 1871), 7 Am. Rep. 200	37
Cox v. English-American Underwriters, (CA 9th, 1957), 245 F.2d 330	31
Daly v. Des Moines, (Ia., 1918), 166 NW 712.....	41
Dean v. Newcastle, (Pa., 1901), 50 A. 310.....	44
Delacy v. Mason City, (Ia., 1949), 38 NW 2d 587.....	41
Denver v. Brubaker, (Colo., 1935), 51 P.2d 352	40
Denver v. Wilson, (Colo., 1927), 254 P. 153.....	41
DeWall v. Sioux City, (Ia., 1917), 164 NW 640.....	45
Dewey v. Clark, (CA DC, 1950), 180 F.2d 766	29, 30

TABLE OF AUTHORITIES CITED

iii

	Pages
Dewire v. Bailey, (Mass., 1881), 41 Am. Rep. 219.....	47
Diffenderfer v. Jeffersonville, (Ind., 1918), 118 NE 836....	44
Doherty v. Trenton Trust Co., (N.J., 1956), 126 A.2d 899..	49
Douris v. Butte, (Mont., 1922), 207 P. 1001.....	40
Dulansky v. Iowa-Illinois Gas & Electric Co., (CA 8th, 1951), 191 F. 2d 881.....	27, 28
Dunn v. J. P. Stevens & Co., (CA 2d, 1951), 192 F.2d 854	19
Evans v. Philadelphia, (Pa., 1903), 54 A. 775, 97 Am. St. Rep. 732	44, 45
Evans v. Utica, (N.Y., 1877), 25 Am. Rep. 165.....	44
Fairbanks, Morse & Co. v. Consolidated Fisheries Co., (CA 3d, 1951), 190 F.2d 817.....	20
Finnane v. Perry, (Ia., 1914), 145 NW 494.....	37
Ford v. Luria Steel & Trading Corp., (CA 8th, 1951), 192 F.2d 880	26
Frechette v. New Haven, (Conn., 1926), 132 A. 467	41
General Accident, etc. v. Goodyear Tire & Rubber Co., (CCA 2d, 1942), 132 F.2d 122.....	20
Goff v. Little Falls, (N.Y., 1892), 20 N.Y.S. 175.....	44
Gordon v. Belleville, (Ontario, 1888), 15 Ont. Rep. 26....	45
Gray Tool Co. v. Humble Oil Refining Co., (CA 5th, 1951), 186 F.2d 365	23, 24, 50
Great Atlantic & Pacific Tea Co. v. Chapman, (CCA 6th, 1934), 72 F.2d 112.....	47
Griffith v. William Penn Broadcasting Co., (E.D.Pa., 1945), 4 FRD 475	18
Hampson v. Taylor, (R.I., 1885), 8 A. 331.....	45
Harding v. St. Joseph, (Mo., 1928), 7 SW 2d 707.....	38
Hawley v. Gloversville, (N.Y., 1896), 38 N.Y.S. 647.....	41
Higgins v. Verdun, (Quebec, 1927), 65 C.S. 150.....	37
Hoffman v. Babbitt Bros. Trading Co., (CA 9th, 1953), 203 F.2d 636	32
Holbert v. Philadelphia, (Pa., 1908), 70 A. 746, 20 LRA (NS) 201	49
Holland v. Auburn, (Wash., 1931), 297 P. 769.....	41
Isham v. Broderick, (Minn., 1903), 95 NW 224.....	44

	Pages
Jackson v. Grand Forks, (N.D., 1912), 140 NW 718, 45 LRA (NS) 75	39, 40, 45
Johnson v. Buffalo, (N.Y., 1917), 165 N.Y.S. 372.....	39
Keating v. New London, (Conn., 1926), 133 A. 586.....	40
Kendall v. Albia, (Ia., 1887), 34 NW 833.....	45
Klaus v. Buffalo, (N.Y., 1903), 83 N.Y.S. 620.....	39
Landy v. Silverman, (CA 1st, 1951), 189 F.2d 80.....	18
Lane Bryant v. Maternity Lane, Ltd., of California, (CA 9th, 1949), 173 F.2d 559	30, 31
Leclerc v. Montreal, (Quebec, 1898), 15 C.S. 205.....	39
Linton v. Jones, (Ind., 1921), 130 NE 541	40
Llewellyn v. Wilkes-Barre, (Pa., 1916), 98 A. 886	40
Lockie v. Wertheimer Cattle Co., (D. Minn. 1946), 5 FRD 45	25, 26
Lord Baltimore Filling Station v. Miller, (App. D.C., 1940), 110 F.2d 698	48
Lucey v. Norwich, (Conn., 1919), 106 A. 762	41, 45
M. Snower & Co. v. United States, (CCA 7th, 1944), 140 F.2d 367	20
McClain v. Duluth, (Minn., 1925), 203 NW 776	40
McDonough v. St. Paul, (Minn., 1930), 230 NW 89	39
McElwain v. Wickwire Spencer Steel Co., (CCA 2d, 1942), 126 F.2d 210	19
McLoughlin v. Corry, (Pa., 1874), 18 Am. Rep. 432	40
McManus v. Duluth, (Minn., 1912), 179 NW 906	39
McPherson v. Buffalo, (N.Y., 1897), 43 N.Y.S. 658	40, 44
Mesberg v. Duluth, (Minn., 1934), 254 NW 597	38
Metal Furniture Co. v. United States, (CCA 2d, 1945), 149 F.2d 130	18
Minor v. Washington Terminal, (CA DC, 1950), 180 F.2d 10	30
Mitchell v. Union Pacific Railroad Co., (CA 9th, 1957), 242 F.2d 598	32
Moscon v. Philadelphia, (Pa., 1942), 24 A. 2d 30	39
Muncie v. Hey, (Ind., 1905), 74 NE 250	44
Myers v. Des Moines, (Ia., 1923), 193 NW 537	40
New and Used Auto Sales v. Hansen, (CA 9th, 1957), 245 F.2d 951	32

TABLE OF AUTHORITIES CITED

v

	Pages
Pacific American Fisheries v. Mullaney, (CA 9th, 1951), 191 F.2d 137	31
Palmer v. Edgerly, (N.H., 1935), 181 A. 125	47
Parks v. Des Moines, (Ia., 1923), 191 NW 728	41
Peckham v. Ronrico Corp., (CA 1st, 1948), 171 F.2d 653 ..	18
Penor v. Glens Falls, (N.Y., 1910), 122 N.Y.S. 1072	41, 44
Petnel v. American Telephone & Telegraph Co., (SD NY, 1952), 13 FRD 249	33
Phillips Petroleum Co. v. Childress, (CCA 10th, 1935), 78 F.2d 861	47
Pierce v. Ford Motor Co., (CA 4th, 1951), 190 F.2d 910, cert. den. (1951) 342 US 887, 72 S.Ct. 178, 96 L.ed. 666	22
Powers v. Chicago, (Ill., 1886), 20 Ill. App. 178	44
Ramsouer v. Midland Valley Railroad Co., (CCA 8th, 1943), 135 F.2d 101	24, 25, 46
Randall v. Hot Springs, (S.D., 1924), 199 NW 40	39, 40
Rose v. Fort Dodge, (Ia., 1917), 155 NW 170	41
Sarnoff v. Ciaglia, (CCA 3d, 1947), 165 F.2d 167	20
Sartor v. Arkansas Natural Gas Co., (1944), 321 U.S. 620, 64 S.Ct. 724, 88 L.ed. 967	17, 19
Schroeder v. Hartford, (Conn., 1926), 132 A. 901	37
Smith v. Chicago, (CC ND Ill., 1889), 38 F. 388	38
Smith v. Cloquet, (Minn., 1912), 139 NW 141	39
Smith v. District of Columbia, (D.C., 1951), 189 F.2d 671 39 ALR 2d 773	38, 40, 41
Smith v. New York, (N.Y., 1953), 125 N.Y.S. 2d 123	41
Smith v. Spokane, (Wash., 1897), 47 P. 888	47
Smith v. St. Joseph, (Mo., 1923), 250 SW 616	39
Smith v. Yankton, (S.D.), 121 NW 848	45
Speakman v. Dodge City, (Kans., 1933), 22 P.2d 485	39
Spencer v. Kansas City, (Kan., 1914), 139 P. 1029	47
Spencer v. Philadelphia, (Pa., 1923), 120 A. 131	40
Sprague v. Vogt, (CCA 8th, 1945) 150 F.2d 795	26
Steck v. Allegheny, (Pa., 1906), 62 A. 1115	45
Stevens v. Howard D. Johnson Co., (CA 4th, 1950), 181 F.2d 390	21
Street v. Holyoke, (Mass., 1870), 7 Am. Rep. 500	38
Suttmoeller v. St. Louis, (Mo., 1921), 230 SW 67	37, 39

	Pages
Toebelman v. Missouri-Kansas Pipeline Co., (CCA 3d, 1942), 130 F.2d 1016	20
Touhey v. Medicine Hat, (Alberta, 1912), 7 D.L.R. 759, aff'd 10 D.L.R. 691	39, 40, 45
Townsend v. Butte, (Mont., 1910), 109 P. 969	38
Traylor v. Black, Sivalls & Bryson, (CA 8th, 1951), 189 F.2d 213	26, 27
Twogood v. New York, (N.Y., 1886), 6 NE 275	45
United Meat Co. v. R.F.C., (CA DC, 1949), 174 F.2d 528 ..	30
Walling v. Fairmont Creamery Co., (CCA 8th, 1943), 139 F.2d 318	20, 26
Walling v. Reid, (CCA 8th, 1943), 139 F.2d 323	20
Walsh v. Buffalo, (N.Y., 1897), 44 N.Y.S. 942	39
Weisser v. Mursam Shoe Corp., (CCA 2d, 1942), 127 F.2d 344, 145 ALR 467	20
Welsh v. Amesbury, (Mass., 1898), 49 NE 735	47
Whitaker v. Coleman, (CCA 5th, 1940), 115 F. 2d 305..	19, 22, 23
Williams v. City of New York, (N.Y., 1915), 108 NE 448.	42, 43, 45
Wittlin v. Giacalone, (App. DC, 1946), 154 F. 2d 20	30
Woodring v. Duluth, (Minn., 1947), 29 NW 2d 484	39

Rules

Amended Uniform Rules of the District Court for the Dis- trict of Alaska:	
Rule 5(e) (1)	28
Rule 5(e) (2)	4
Federal Rules of Civil Procedure, Rule 56	4, 16, 28

Statutes

Alaska Compiled Laws Annotated, 1949:	
Section 16-1-90	11
Title 53, Chapter 2	1
28 U.S.C. 1291	1

TABLE OF AUTHORITIES CITED

vii

	Pages
48 U.S.C. 101 and 193	1
48 U.S.C. 1294	1

Texts

Beach on Contributory Negligence, (3rd Ed., Rev.):	
Pages 56, 57	46
Page 57 (note 9)	46
Pages 632-634	47
“The State of Alaska” by Ernest Gruening, published in 1954 (Random House, N.Y.: Library of Congress Catalog Card No. 54-7799) at page 462	7-9
Jacobin’s Guide to Alaska (Guide to Alaska Co., Juneau, Alaska. Distrib. Office for U.S.: 6015 Santa Monica Blvd., Los Angeles 38, Calif.), pages 203, 205	6, 7
6 Moore’s Federal Practice (2nd Edition):	
Page 2012	16
Pages 2120, 2121	32
Pages 2022-2023	17
Pages 2123-2126	33

Miscellaneous

82nd Congress—First Session, Senate Report 315:	
Pages 10-11	11
Page 17	10

No. 15,854

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HAL GILFILEN,

Appellant,

VS.

CITY OF SEWARD, a Municipal Corporation,

Appellee.

Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF OF APPELLANT.

JURISDICTIONAL STATEMENT.

The District Court had jurisdiction of this case by virtue of the provisions of Title 53, Chapter 2, Alaska Compiled Laws Annotated, 1949, and 48 U.S.C. 101 and 193. This Court has jurisdiction by virtue of 28 U.S.C. 1291, which provides that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, etc., except where a direct review may be had to the Supreme Court; and 48 U.S.C. 1294 which designates this Court

as the appropriate court for appeals from such judgments in the District Court for the District of Alaska.

STATEMENT OF THE CASE.

On December 16, 1955, appellant Hal Gilfilen filed a complaint in the District Court for the District of Alaska, Third Division, against the City of Seward, a municipal corporation of the Territory of Alaska. The complaint alleged the status of the defendant as a municipal corporation organized and existing under the laws of the Territory of Alaska; that within the corporate limits of the defendant city there was located a widely used public street designated as Fourth Avenue and that there was laid out upon said public street along its Eastside a certain public sidewalk extending parallel to the street; that the public street and sidewalk just referred to, for many years up to the present, had been treated and controlled by the defendant city as a public street and sidewalk; that for a long period of time prior to February 12, 1954, snow and ice had accumulated upon this sidewalk to such an extent as to make travel over it unsafe for pedestrians, in that such snow and ice had accumulated on the sidewalk in an irregular shape, was packed and frozen, and so elevated, uneven, and ridged as to afford an insecure footing to those walking upon the sidewalk; that the defendant city knew, or by the exercise of ordinary care and diligence should have known, of the unsafe condition of the sidewalk and could have removed the accumulation of ice and snow

in a reasonable time before the injury to the plaintiff complained of occurred; that on February 12, 1954, at 8 p.m., the plaintiff, while carefully and lawfully walking on the aforementioned sidewalk in a North-erly direction, because of the unsafe condition of the sidewalk described above, slipped and fell on his left side; that as a result the plaintiff had his left wrist broken, and his elbow dislocated, received a chipped bone in his shoulder, was painfully and permanently injured and disabled and incurred expenses for medical attention and hospitalization, etc. Plaintiff sought judgment against the defendant for his actual medical and hospitalization expenses in the sum of \$7,166.10; for loss of earnings in the sum of \$13,-675.00 and for \$25,000.00 general damages for his injury (R. pp. 3-6). The plaintiff demanded a jury trial of his cause (R. p. 6).

On January 26, 1956, defendant city (appellee herein) appeared and filed its answer in which it admitted its corporate status and the location, existence and general use of Fourth Avenue as a public street, as well as the laying out upon it of the public sidewalk mentioned in the complaint. It denied that it had "treated and controlled" such street and sidewalk as a public street and sidewalk, and further alleged to be without knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to the accumulation of ice and snow upon the sidewalk for a long period of time; the insecure and unsafe condition of such sidewalk; the shape, nature and appearance of such accumulation; or the hazard

to pedestrians resulting therefrom. It denied that it had or should have had notice or knowledge of the condition; admitted that the plaintiff slipped and fell as alleged, but denied, or disclaimed knowledge of, the circumstances surrounding the accident or the damages flowing therefrom (R. pp. 6-8).

On February 23, 1956, appellee City of Seward (defendant below) caused to be taken the deposition of the appellant (plaintiff below), which is set forth on pages 9-43 of the record. On February 25, 1957, appellee filed its motion for summary judgment on the grounds that (1) defendant city was under no legal obligation, with respect to the plaintiff, to remove "natural accumulations of ice and snow" from its sidewalks, and therefore the complaint did not state any cause of action; (2) that the plaintiff was guilty of contributory negligence as a matter of law; and (3) that the plaintiff, as a matter of law, assumed the risk of whatever injuries he incurred, and that therefore the defendant is entitled to summary judgment as a matter of law (R. p. 44). This motion was supported by an affidavit of the attorney for defendant below reciting certain statements contained in the plaintiff's aforementioned deposition (R. pp. 46-47).

In accordance with Rule 56 of the Federal Rules of Civil Procedure and Rule 5(e)(2) of the Amended Uniform Rules of the District Court for the District of Alaska, appellant (plaintiff below), filed a pleading entitled "Statement of Genuine Issues" (R. p. 45). In it, he alleged that the following were genuine issues necessary to be litigated:

1. Whether or not the plaintiff was contributorily negligent as a matter of fact;

2. Whether or not, as a matter of fact, plaintiff assumed the risk of injury when he walked upon the sidewalk in question; and

3. Whether or not, as a matter of fact, the snow and ice which had accumulated upon the sidewalk in question was a "natural" accumulation as was presupposed by the motion for summary judgment.

On August 22, 1957, the District Judge entered a final judgment in favor of the appellee City of Seward (defendant below), based upon "*findings of fact*" (*sic*), filed concurrently therewith, to the effect that the court finds that: (1) the court had jurisdiction over the parties and subject matter of the action; (2) on February 12, 1954 the plaintiff slipped upon a sidewalk covered with ice and snow in the City of Seward, Alaska; (3) the accumulation of ice and snow upon which the plaintiff slipped was a natural accumulation (*sic*); (4) the plaintiff slipped on the said sidewalk by reason of his own contributory negligence; (5) the plaintiff knew the condition of the sidewalk, and voluntarily attempted to pass over it, and assumed the risk of any injuries incurred thereby. Based upon these "findings of fact" the District Court drew conclusions of law, to wit: (1) the City of Seward was under no legal obligation, with respect to the plaintiff, to remove *natural* (*sic*) accumulations of ice and snow from its sidewalks; and, therefore, *the complaint failed to state a claim for relief*; (2) *as a matter of law*, the plaintiff was guilty of contribu-

tory negligence, and assumed the risk of whatever injuries he incurred and was consequently precluded from any recovery; and (3) the defendant was entitled to summary judgment *as a matter of law* (R. pp. 48-50, Italics supplied).

From the foregoing final judgment and from an amended judgment dated October 9, 1957, entered for the purpose of fixing the amount of costs and attorneys' fees to be recovered by defendant (appellee herein), the plaintiff below has appealed to this Court.

STATEMENT OF THE FACTS.

Appellant herein (plaintiff below) is engaged in business in the City of Seward, Territory of Alaska (R. p. 10). Seward is located at the head of Resurrection Bay, on the Southeastern shore of the Kenai Peninsula, 114 miles South of the Alaskan hub city of Anchorage.

The ninth annual edition of Jacobin's Guide to Alaska¹ describes the City of Seward as follows:

"Seward, ideally located at the head of a perfect harbor, is the metropolis of the world-famous Kenai Peninsula, greeting the tourist and the sportsman with a fresh, clean breath of Northern Alaska and the Interior. A modern city with up-to-date stores, shops, hotels and restaurants, movie theater, bank, laundries, cleaning plants, and entertainment spots, Seward is a far cry from

¹Published by Guide to Alaska Co., Juneau, Alaska. Distrib. Office for U.S.: 6015 Santa Monica Blvd., Los Angeles 38, Calif.

the wasteland that Alaska was believed at one time to be. It boasts of excellent schools and churches and a fine hospital maintained by the Methodist Mission, a small boat harbor, canneries, machine shops, auto sales and service, clubs, lodges, Chamber of Commerce, and a bi-weekly newspaper. * * * With one of the finest land-locked harbors, Seward has long been known as 'the Gateway to the Kenai', southern terminus of the Alaska Railroad, northern terminus of the Alaska Steamship Company. * * * Seward was founded in 1904 by solid American citizens and is today a typical American town. * * * Once a visitor lands in Seward and spends a few hours he feels quite at home with the Seward Alaskan. Plans are being laid in Seward for new impetus since the war, for new avenues of contact with neighbors, new conveniences, new industries, and a new Seward and Kenai Peninsula. A new highway to Anchorage and the western shores of Kenai has put Seward in closer touch with the fast-growing farming communities of Homer and the interior of Alaska. Although the growing season is short, excellent fruits and vegetables are raised in and about Seward, where peas are found in gardens in October, turnips and carrots of fine quality in middle November. * * *

loc. cit., at pp. 203, 205.

In a book, published in 1954,² entitled "The State of Alaska", by Ernest Gruening, former governor of the territory of Alaska, there appears a map (on page 462) showing isotherms, *i.e.*, lines of equal average

²Random House, N.Y.: Library of Congress Catalog Card No. 54-7799.

temperature for winter months in Alaska, Canada and the United States. One of these lines of equal temperature (30°) runs across the mouth of Cook Inlet along the southern shore of the Kenai Peninsula and directly through the City of Seward; thence along the coast of the Alaska Gulf through Juneau, parallel with the coastline of Southeastern Alaska and British Columbia through Vancouver, B.C., Seattle, and thence curving South parallel with the Pacific Coast through Reno, Nevada; thence curving East through Arizona, New Mexico and across the middle tier of States until it touches St. Louis, Missouri; thence further due East until it approaches the Atlantic Coast just West and North of Washington, Philadelphia and New York City. A second isothermal zone includes the Southern part of Western Alaska, including Anchorage and the Matanuska Valley, Western Canada, and the Northern tier of the United States, including such cities as Denver, Omaha and Chicago, as well as Ontario, Canada and the New England states. Commenting on the map, Governor Gruening states:

“The isotherms above, showing lines of equal average temperature for winter months, reveal more strikingly than words the facts about Alaska’s climate. Due to the Japan Current, which skirts the entire Pacific Coastal area, its cities and towns, containing the greater part of Alaska’s population, enjoy milder winters than the Northern parts of the United States. Ketchikan’s and Sitka’s winter temperatures approximate those of Washington and Philadelphia respectively, Juneau’s those of New York City, and are higher

than those of Boston, Detroit, Chicago, Omaha and Denver. The winter temperatures of the Anchorage area are higher than those of Northern New England, Wisconsin, Minnesota, the Dakotas, Wyoming and Montana. Even Nome, less than a hundred miles below the Arctic Circle, has winter temperatures higher than those of the provincial capitals of Winnipeg and Regina just North of the United States-Canada boundary. * * *"

lot cit., at p. 462.

The Committee report on S. 50, of the Eighty-second Congress, contains the following pertinent comments on the climate of this part of Alaska:

"The January mean temperature of 20 degrees above zero in Anchorage compares to that in Concord, New Hampshire. The January mean of 33.6 degrees at Ketchikan is about the same as Denver and New York. Ketchikan's record low of 8 degrees below zero approximates record low temperatures for Washington, D.C. and is considerably warmer than the record cold in such cities as Chicago and Boston. * * * The average annual precipitation in Alaska in its present agricultural areas is 11.71 inches in the Tanana Valley, 15.45 inches in the Matanuska Valley and 32.59 inches on the Kenai Peninsula.³ * * * Despite the fact that Alaskan waters are 100 miles to the North, there are more frozen rivers and harbors in the United States than there are from the Aleutians to the Southern tip of the Alaska Panhandle. This is largely due to the influence

³Compare, *e.g.*, Chicago, Ill. 32.72 in.; Kansas City, Mo. 35.31 in.; New York, N.Y. 42.03 in.; Seattle, Wash. 31.92 in.; Washington, D.C. 41.52 in.

of the Japanese Current which skirts the Alaska coast * * *."

82nd Congress—First Session, Senate Report 315, p. 17.

The official information bulletin relative to the disposal and leasing of public lands in Alaska (Information Bulletin No. 2), published by the Bureau of Land Management of the United States Department of the Interior, states as follows:

"The South-Central region includes the Prince William Sound and the Cook Inlet sections of the Southern coast, and it extends North to the Alaska Range. There is regular steamship service from Seattle to Valdez, the Southern terminus of the Richardson Highway, and to Seward, the Southern terminus of the Alaska Railroad.

"Along the coast of Prince William Sound, the topography, climate and vegetation somewhat resembles Southeastern Alaska. The winters are relatively mild, summers are cool, and precipitation is generally heavy.⁴ On the inner coastal lowlands of Cook Inlet, the topography is more uniform. The climate is a favorable combination of the temperate coastal climate of Southern Alaska and the extreme continental climate of the interior.* * *

"Within south-central Alaska, conditions affecting settlement vary from area to area * * *. Certain localities offer, at this time, much better settlement opportunities than do others. Among the more favored areas are parts of the Kenai

⁴NB: Seward lies inland from Prince William Sound, on sheltered Resurrection Bay.

Peninsula, the area around Anchorage, and the Matanuska Valley. * * *''

loc. cit., at pp. 10-11.

On February 12, 1954, at about 8 p.m., the appellant (plaintiff below), left a building he owned, located on the East side of Fourth Avenue, a main public street in the City of Seward, for the purpose of visiting a retail establishment likewise owned by him, located on the same street, in a Northerly direction (R. pp. 10, 11, 12). The temperature was just about freezing, *i.e.*, in the lower thirties (R. p. 14). There had not been any precipitation of snow in the city of Seward for several days (R. p. 14). There was no wind (R. p. 18). Appellant was wearing brown oxford shoes and possibly rubber overshoes (R. p. 18).

He proceeded in a Northerly direction, on and along the public sidewalk which is laid out on the *Eastside* of Fourth Avenue, heading towards his retail store, passing certain business establishments known, respectively, as the Legion Cab Office and the Alaska Shop on the way (R. pp. 11, 12, 21). In obedience to a Seward City ordinance, which shifts the burden of the actual cleanup of sidewalks to the owners of adjacent property,⁵ the sidewalk in front

⁵Legal authority for this ordinance is derived from Sec. 16-1-90, ACLA 1949, which reads as follows: "Sec. 16-1-90. *Clearing sidewalks of snow: Assessment for: Lien of assessment: Penalty and interest.* The Council shall have authority by ordinance to require the owners of all real property in the city at their own expense to keep the sidewalks in front of their respective premises reasonably clear from snow, and, in event they fail to do so in conformity with ordinances enacted for that purpose, the council shall have authority to cause the snow to be removed from such

of these establishments had been cleared of snow (R. p. 19). As he proceeded further North he came to a portion of the sidewalk lying directly in front of a 22-foot wide vacant lot, owned by one Baumgartner and known as Lot 27, Block 9, Seward Townsite (R. pp. 4, 11, 12, 13, 18, 20). The sidewalk directly in front of this vacant lot was covered with an accumulation of packed and frozen snow, which had turned into a mound of ice estimated to have been from 4½ to 8 inches thick. This accumulation was of irregular shape, and was packed and frozen, and so elevated, uneven and ridged as to make insecure the footing of persons walking upon the sidewalk (R. pp. 14, 15, 19). Similar obstructions existed on part of the sidewalk on the *Westside* of Fourth Avenue (R. pp. 17, 19).

Although this condition had been brought to the attention of city officials prior to the time of the accident (R. p. 17), the city had failed to cause its removal and it had remained in its unsafe condition all winter long (R. p. 14). The street adjoining the sidewalk was partly obstructed by automobiles, which under a city ordinance were parked at a 30-degree angle (R. p. 21). Moreover, the section of Fourth Avenue directly adjacent to that portion of the sidewalk on which the aforementioned accumulation of

sidewalk and assess the cost thereof against such premises in the manner provided by ordinance for that purpose. Such assessment shall be a paramount lien upon the premises against which it is assessed and may be collected and enforced as general taxes or special assessments for improvements are collected and enforced. The council may also provide for penalty and interest after delinquency to the extent authorized in case of assessment for local improvements as provided in this Article."

snow and ice was situated was covered with packed snow and there was a sheet of ice on it stretching across the sidewalk on the opposite side, because of water which had frozen following a fire. The fire had occurred, on the morning of the day of appellant's accident, at the Seward Bakery, located on the West-side of Fourth Avenue, directly opposite the vacant lot just referred to (R. pp. 34, 35).

As appellant proceeded North on the sidewalk, laid out on the Eastside of Fourth Avenue, he left the cleared portion of the sidewalk and stepped onto the accumulation of ice and snow in front of the vacant lot. He took a few steps and then, in his own words, "my feet went straight up. I threw out my arm to catch myself—and at that time I weighed 210 pounds—and I lit with my hand and also injuring my wrist and hand, dislocated the elbow and had several other impacts * * *. I was picked up by a man named Ray O'Hara who is the City Manager of Seward and was taken to the Seward General Hospital. * * *" (R. pp. 11, 20). As a result of the injuries sustained, appellant had to undergo prolonged, painful and costly treatment, partially lost the use of his arm, wrist and shoulder and was put to heavy loss of income, compelling him to go into debt (R. pp. 21-40).

The obstruction of the sidewalk which caused appellant's fall was plainly visible and was known to appellant to exist (R. p. 15). There is some evidence that appellant knew of other persons who had fallen in that vicinity before February 12, 1954 (R. pp. 15, 16), but it does not appear that he acquired this

knowledge prior to his own accident (R. pp. 15-17). The unsafe condition of the sidewalk was known to the appellee, the City of Seward (R. p. 19).

There were several eye witnesses to the accident who would have been called in the event of trial (R. pp. 20, 21). The record contains no evidence rebutting appellant's allegations (R. p. 4) that he was proceeding "carefully and lawfully" across the sidewalk, obstructed in the manner described above, when the accident occurred. Nor is there any evidence to rebut his allegations and testimony (R. pp. 4, 14, 17) that the appellee (defendant below) City of Seward knew of the existence of the hazardous condition of the sidewalk, but failed to perform its legal duty to remove the obstruction, during the entire winter. The dangerous and icy condition of the street adjoining the East sidewalk and the fact that the West sidewalk was likewise obstructed in at least two places, in front of the Seward Bakery and near the Seward Laundry (R. pp. 19, 35), remains likewise uncontradicted. There is nothing in the record to show the relative degree of impassibility of these alternate routes. It is uncontroverted that the appellant was lawfully and properly upon the sidewalk in the course of proceeding from a building which he owned to a retail store likewise belonging to him and located on the same street.

Not only has the City of Seward failed to introduce any affirmative showing to rebut the allegations concerning the dangerous obstruction of the sidewalk in the form of an accumulation of ice and snow, as described in the complaint, or to disprove its neglect in failing to remove it, but indeed it has admitted in its

pleadings that "it is without knowledge or information sufficient to form a belief as to the truth" of these allegations (R. p. 7). Nothing is shown to explain *why* appellee failed to acquire such information, as alleged. The record in fact consists of the pleadings, the testimony of the appellant (plaintiff below) and certain climatological data, which were introduced by the appellee (defendant below), and which generally indicate that Seward experiences about the same type of winter weather as is common to many cities in the Northern and Central portions of the United States (*vide supra*).

ISSUES PRESENTED.*

1. *Where genuine issues of fact have been raised as to the nature of an accumulation of ice and snow on a sidewalk causing a pedestrian to slip and fall; and as to whether or not such pedestrian was guilty of contributory negligence, or assumed the risk, when he used the obstructed sidewalk with knowledge of its condition, was it error for the District Court to enter summary judgment for the defendant?*

2. *Did the District Court err in finding as a matter of fact and ruling as a conclusion of law that appellant (plaintiff below) was guilty of contributory negligence and that he assumed the risk of injuries incurred, when he passed over a sidewalk obstructed by an accumulation of ice and snow?*

3. *Did the District Court err in finding as a matter of fact and adopting as a conclusion of law that the*

*Comprising Specifications of Error.

accumulation of ice and snow which caused appellant's injury was a "natural" accumulation and that therefore the appellee was under no legal obligation, with respect to appellant, to remove such accumulation?

ARGUMENT.

1. WHERE THERE ARE GENUINE ISSUES OF FACT MATERIAL TO THE CLAIM FOR RELIEF, IT IS ERROR TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE PLEADINGS AND PLAINTIFF'S TESTIMONY AT AN ORAL DEPOSITION.

Summary judgment procedures are authorized by Rule 56 of the Federal Rules of Civil Procedure, in specific implementation of the underlying philosophy of the Federal Rules as stated in Rule 1 "to secure the just, speedy and inexpensive determination of every action." As stated by Professor Moore in his treatise on Federal Practice "if Rule 56 is applied with wise discernment it will materially aid the general objective of the Rules by eliminating useless trials. If it is not so applied, it will delay a final determination that is just."

6 Moore's Federal Practice (2nd Ed.) 2012.

The summary judgment procedure prescribed in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. In many cases there is no genuine issue of fact, although such issue is raised by the formal pleadings. The purpose of Rule 56 is to eliminate a trial in such cases, since a trial is unnecessary and results in delay and expense which may operate to

defeat in whole or in part the recovery of a just claim or the expeditious termination of an action because of a meritorious defense that is factually indisputable.

Functionally, the theory underlying a motion for summary judgment is essentially the same as the theory underlying a motion for directed verdict. The *crux* of both theories is that there is no genuine issue of material fact to be determined by the trier of the facts, and that on the law applicable to the established facts the movant is entitled to judgment. As Justice Jackson stated in *Sartor v. Arkansas Natural Gas Co.*, (1944), 321 U.S. 620, 624, 64 S.Ct. 724, 88 L.ed. 967: "A summary disposition * * * should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party."

There is an important distinction, however, between summary judgment and directed verdict. Where the defendant's motion for a directed verdict is sustained at the end of plaintiff's case, the judge has at least heard testimony at a live trial, but if the trial court improperly sustains a motion for summary judgment, reversal follows with its attendant delay and expense. By means of Rule 50(b), the directed verdict trial technique, moreover, has been molded so that a legal decision by the trial court can be obtained with a minimum of judicial waste. The summary judgment procedure on the other hand is productive of grave injustice or waste, or both, where judgment is improvidently granted.

The function of the summary judgment is to avoid a useless trial; and a trial is not only not useless but absolutely necessary where there is a genuine issue as to any material fact. In ruling on a motion for summary judgment the court's function is to determine whether such a genuine issue exists, not to resolve any existing factual issues.

Arnstein v. Porter, (CCA 2d, 1946), 154 F.2d 464, 471.

Summary judgment may properly be granted upon the pleadings as amplified by evidence contained in a deposition, but unless the deposition offered in support of a motion for summary judgment, together with other supporting materials, if any, clearly establishes that there is no genuine issue of material fact, the motion for summary judgment must, of course, be denied.

Griffith v. William Penn Broadcasting Co., (E.D.Pa., 1945), 4 FRD 475.

The problem of the improvident granting of summary judgments in cases involving disputed material facts has arisen in each of the circuits. Thus in the First Circuit, in *Peckham v. Ronrico Corp.*, (CA 1st, 1948), 171 F.2d 653, 657, the court in reversing summary judgment for the defendant observed that: "A litigant has a right to a trial where there is the slightest doubt as to the facts." See also:

Landy v. Silverman, (CA 1st, 1951), 189 F.2d 80, 82.

The Second Circuit, speaking through Judge Frank in *Metal Furniture Co. v. United States*, (CCA 2d,

1945), 149 F.2d 130, 135, admonished the trial courts in this manner:

“We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgments. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time saving device. But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay (citing cases). The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered.”

See also:

Dunn v. J. P. Stevens & Co., (CA 2d, 1951), 192 F.2d 854 (action for personal injuries from fall upon a sidewalk abutting defendant's premises. Summary judgment for defendant on the pleadings, reversed).

And see:

Sartor v. Arkansas Natural Gas Corp., (*supra*);
Arenas v. United States, (1944), 322 US 419,
 64 S.Ct. 1090, 88 L.ed. 1363;
Whitaker v. Coleman, (CCA 5th, 1940), 115 F.
 2d 305, 306;
McElwain v. Wickwire Spencer Steel Co.,
 (CCA 2d, 1942), 126 F.2d 210;

- Weisser v. Mursam Shoe Corp.*, (CCA 2d, 1942), 127 F.2d 344, 145 ALR 467;
Toebelman v. Missouri-Kansas Pipeline Co., (CCA 3d, 1942), 130 F.2d 1016;
General Accident, etc. v. Goodyear Tire & Rubber Co., (CCA 2d, 1942), 132 F.2d 122;
Walling v. Fairmont Creamery Co., (CCA 8th, 1943), 139 F.2d 318;
Walling v. Reid, (CCA 8th, 1943), 139 F.2d 323;
M. Snower & Co. v. United States, (CCA 7th, 1944), 140 F.2d 367.

Again, in *Toebelman v. Missouri-Kansas Pipeline Co.*, (*supra*), the Third Circuit through Judge Maris stated in a relatively early case that:

“Upon a motion for a summary judgment it is no part of the court’s function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. * * * All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment.”

loc. cit., at p. 1018.

See also:

Sarnoff v. Ciaglia, (CCA 3d, 1947), 165 F.2d 167.

And in *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, (CA 3d, 1951), 190 F.2d 817, 824, Judge Staley laid it down that “the law is clear that one who moves for a summary judgment has the burden

of demonstrating that there is no genuine issue of fact.”

In reversing a summary judgment for the defendant, in an action to recover damages for breach of a rental contract, the late Chief Judge Parker, for the Fourth Circuit, stated in *Stevens v. Howard D. Johnson Co.*, (CA 4th, 1950), 181 F.2d 390:

“The motion for summary judgment, authorized by Rule 56, which in effect legalizes the ‘speaking’ demurrer, has an important place in providing a prompt disposition of cases which have no possible merit and in preventing undue delays in the trial of actions to which there is no real defense; but it should be granted only where it is clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law (citing cases). And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom (citing cases).”

loc. cit., at p. 394.

In the case just cited the plaintiff had demanded a jury trial. A number of questions had arisen in the case in connection with the breach, the proper interpretation of the contract, and recoverable damages. Judge Parker stated:

“These, however, should be decided in the light of the evidence which may be adduced upon a trial, not upon the affidavits presented on a motion to dismiss. It must not be forgotten that, in actions at law, trial by jury of disputed questions of fact is guaranteed by the Constitution, and that

even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible upon pleadings and affidavits."

The same eminent judge, in the case of *Pierce v. Ford Motor Co.*, (CA 4th, 1951) 190 F.2d 910, cert. den. (1951) 342 US 887, 72 S.Ct. 178, 96 L.ed. 666, in reversing a summary judgment for the defendant in a negligence case, stated:

"From what we have said, it is clear that there were issues in the case for a jury to decide, and it was error to enter summary judgment for defendant for that reason. It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper. Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented."

loc. cit., at p. 915.

The Fifth Circuit, speaking through Judge Hutcheson, in *Whitaker v. Coleman*, (*supra*), forcefully states the controlling principles as follows:

"* * * The invoked procedure, valuable as it is for striking through sham claims and defenses which stand in the way of a direct approach to the truth of a case, was not intended to, and it

cannot deprive a litigant of, or at all encroach upon, his right to a jury trial. * * * To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force. * * * Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.”

loc. cit., at pp. 306, 307.

Again, in *Gray Tool Co. v. Humble Oil Refining Co.*, (CA 5th, 1951), 186 F.2d 365, the same circuit applied these principles to a court case, and after pointedly noting that the trial court, as too frequently happens, had allowed the summary judgment procedure to be misused to cut a trial short, observed “that short-cutting of trials is not an end in itself, but a means to an end, and that in the conduct of trials, as in other endeavors, it is quite often true that the longest way around is the shortest way through;” and that it is not the function of a court in ruling on a motion for summary judgment to draw fact inferences in

favor of the party for whom summary judgment is rendered.

loc. cit., at p. 367.

See also:

Chappell v. Goltsman, (CA 5th, 1950), 186 F.2d 215.

The last mentioned thought was also expressed by Justice, then Judge, Minton, speaking for the Seventh Circuit in *Campana Corp. v. Harrison*, (CCA 7th, 1943), 135 F.2d 334, where in a corporate taxpayer's action to recover excise taxes paid under protest, the parties were at issue as to whether the taxpayer had borne the tax burden, and whether its dealings with its sales company were at arm's length. Judge Minton stated: "Affidavits were filed to prove and to disprove these issues of fact, and the court on these conflicting affidavits undertook to resolve the conflict. This action of the court was not proper * * *."

loc. cit., at p. 336.

On the other hand a party *opposing* summary judgment is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence for the purpose of defeating summary judgment. This is well illustrated by *Ramsouer v. Midland Valley Railroad Co.*, (CCA 8th, 1943), 135 F.2d 101, a negligence action under the Federal Employers' Liability Act. In an earlier state action the state court had announced its intention to sustain defendant's demurrer to the evidence at the conclusion of plaintiff's case; whereupon plaintiff, with leave of court, had dismissed the action without preju-

dice. On the basis of that testimony and other material the District Court, in the subsequent case at bar, sustained defendant's motion for summary judgment on the ground that the facts showed no negligence. In reversing this summary judgment, Judge Gardner, for the Eighth Circuit, stated:

"The record in this case is unusual in that it contains all the evidence introduced at the trial in the Oklahoma court. The question presented by such a motion (for summary judgment) is whether or not there is a genuine issue of fact. It does not contemplate that the court shall decide such issue of fact, but shall determine only whether one exists (citing cases). In considering such a motion, as in a motion for a directed verdict, the court shall take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits. Viewing the evidence in the light most favorable to plaintiff, we think it presented a genuine issue of fact from which a jury might reasonably decide that Ramsouer's injuries resulted in whole or in part from the negligence of the defendant * * *."

loc. cit., at pp. 103, 106.

See also:

Lockie v. Wertheimer Cattle Co., (D. Minn. 1946), 5 FRD 45 (defendant entitled to all favorable inferences that may reasonably be drawn from the evidence on plaintiff's motion for summary judgment; denied).

Judge Riddick, also speaking for the Eighth Circuit in *Walling v. Fairmont Creamery Co.*, (*supra*), stated:

“On a motion for a summary judgment the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized by the court. * * * On appeal from an order granting a defendant’s motion for summary judgment the circuit court of appeals must give the plaintiff the benefit of every doubt.”

loc. cit., at p. 322.

See also:

Sprague v. Vogt, (CCA 8th, 1945), 150 F.2d 795, 801;

Ford v. Luria Steel & Trading Corp., (CA 8th, 1951), 192 F.2d 880;

Lockie v. Wertheimer Cattle Co., (*supra*).

In reversing a summary judgment for the defendant, Judge Delehant stated in *Traylor v. Black, Sivalis & Bryson*, (CA 8th, 1951), 189 F.2d 213:

“A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively

that the plaintiff would not be entitled to recover under any discernible circumstances (citing cases). A summary judgment is an extreme remedy, and under the rule, should be awarded only when the truth is quite clear (citing cases). And all reasonable doubts touching the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment.”

loc. cit., at p. 216.

Dulansky v. Iowa-Illinois Gas & Electric Co., (CA 8th, 1951), 191 F. 2d 881, further illustrates the improper use of the summary judgment procedure at the trial court level. This was an action to recover damages for the death of plaintiff's 10-year-old son allegedly caused by the negligent operation of defendant's bus in striking the child while he was riding a bicycle on a street. Defendant moved for summary judgment on the basis of the testimony taken at a coroner's inquest, and the affidavits of its bus operator, of the sole passenger on the bus at the time of the accident, and of two physicians. Plaintiff countered with certain affidavits and there were also submitted answers to certain interrogatories and possibly other documentary evidence.

After having the matter under advisement for six months, the trial court filed findings of fact and conclusions of law and granted defendant's motion. In reversing, Circuit Judge Gardner stated:

“A proceeding on motion for summary judgment is in the nature of an inquiry in advance of the trial for the purpose of determining whether

there is a genuine issue of fact and not for the purpose of determining an issue of fact. * * * *As a summary judgment presupposes that there is no genuine issue of fact, findings of fact and conclusions of law are not required.*⁶ * * * It is apparent from a consideration of the court's findings and conclusions that in determining whether or not there was a genuine issue of fact the court gave no thought to what *inferences* might reasonably be drawn from the circumstances. The case is largely dependent upon circumstantial evidence. *The court also failed to view the evidence, as it should, in a light most favorable to the plaintiffs.* * * * The burden of proof was upon the movant, not upon the plaintiffs, and *all doubts are resolved against the movant.*" (Italics supplied.)

loc. cit., at pp. 883, 885.

The Tenth Circuit has followed the views expressed above in *Avrick v. Rockmont Envelope Co.*, (CCA 10th, 1946), 155 F.2d 568, when speaking through Judge Murrah it said as follows:

"The salutary purpose of Rule 56 is to permit speedy and expeditious disposal of cases where the pleadings do not as a matter of fact present

⁶Compare the use of findings of fact and conclusions of law in the present case (R. pp. 48-49) and Rule 5(e)(1) of the *Amended* Uniform Rules of the District Court for the District of Alaska, which was retained at the insistence of the District Judge in the present case, against a contrary recommendation of the Alaska Bar Association, based upon its conflict with Rule 56, FRCP and the cases decided thereunder. The Rule provides in pertinent part as follows: "(e) Motions for Summary Judgment: (1) There shall be served and filed with each motion for summary judgment * * * proposed findings of fact and conclusions of law * * *."

any substantial question for determination. Flimsy or transparent charges or allegations are insufficient to sustain a justiciable controversy requiring the submission thereof. The purpose of the rule is to permit the trier to pierce formal allegations of fact in pleadings and grant relief by summary judgment when it appears from uncontroverted facts set forth in affidavits, depositions or admissions on file that there are as a matter of fact no genuine issues for trial (citing cases). But, it is not the purpose of the Rule to deprive litigants of their right to a full hearing on the merits if any real issue of fact is tendered (citing cases). The power to pierce the flimsy and transparent factual veil should be temperately and cautiously used lest abuse reap nullification (citing cases). An expeditious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one's fundamental right to his full day in court. * * *

loc. cit., at pp. 571, 573.

After discussing leading cases of his and other courts, Judge Fahy of the Court of Appeals for the District of Columbia Circuit, in *Dewey v. Clark*, (CA, DC 1950), 180 F.2d 766, offers the following excellent summary:

“Our study of the question makes the following points clear: (1) Factual issues are not to be tried or resolved by summary judgment procedures; only the existence of a genuine and material factual issue is to be determined. Once it is determined that there is such an issue summary judgment may not be granted; (2) In making this determination doubts (of course the

doubts are not fanciful) are to be resolved against the granting of summary judgment; (3) There may be no genuine issue even though there is a formal issue. Neither a purely formal denial nor, in every case, general allegations, defeat summary judgment. On this point the cases decided by this court must rest on their own facts rather than upon a rigid rule that an assertion and a denial always preclude the granting of summary judgment. Those cases stand for the proposition that formalism is not a substitute for the necessity of a real or genuine issue. Whether the situation falls into the category of formalism or genuineness cannot be decided in the abstract; (4) If conflict appears as to a material fact the summary procedure does not apply unless the evidence on one or the other hand is too incredible to be accepted by reasonable minds or is without legal probative force even if true; (5) To support summary judgment the situation must justify a directed verdict insofar as the facts are concerned.”

loc. cit., at p. 772.

See also:

Wittlin v. Giacalone, (App. DC, 1946), 154 F. 2d 20;

Minor v. Washington Terminal, (CA DC, 1950), 180 F.2d 10;

United Meat Co. v. R.F.C., (CA DC, 1949), 174 F.2d 528.

This Honorable Court has similarly insisted in *Lane Bryant v. Maternity Lane, Ltd., of California*, (CA 9th, 1949), 173 F.2d 559, in the language of then

Judge, now Chief Judge Stephens, that: "judgment cannot validly be based upon a summary trial by affidavits" and that the parties are entitled to have issues of fact tried at a trial "through the introduction of exhibits and witnesses produced for direct and cross-examination."

loc. cit., at p. 565.

See also:

Pacific American Fisheries v. Mullaney, (CA 9th, 1951), 191 F.2d 137.

In *Cox v. English-American Underwriters*, (CA 9th, 1957), 245 F.2d 330, this Court in reversing summary judgment for defendant, said, (*per* James Alger Fee, J.) as follows:

"In haste to dispose of a crowded calendar, a trial judge may be misled into believing a summary judgment is a quick solution for a problem. But this highly effective device should not be used as a substitute for trial on the facts and law. Especially is this true where the parties are entitled to trial by jury.⁷ It may be that plaintiff cannot win this law suit before a jury. The mere fact that the trial judge conceives this to be true does not endow him with authority to take the place of the jury and decide hotly contested issues of fact."

loc. cit., at p. 333.

⁷Trial by jury was demanded, as of right, in the present case. (R. p. 6).

See also:

Hoffman v. Babbitt Bros. Trading Co., (CA 9th, 1953), 203 F.2d 636;

Mitchell v. Union Pacific Railroad Co., (CA 9th, 1957), 242 F.2d 598.

In two recent cases, moreover, this Court has felt constrained to reverse summary judgments improvidently granted by the self-same District Court for the District of Alaska, Third Judicial Division. Thus, in the case of *Carr v. City of Anchorage*, (CA 9th, 1957), 243 F.2d 482, this Court held that when pleadings and affidavits raise certain disputed questions of fact, they must all be resolved in the favor of appellants for the purpose of considering the motion for summary judgment and the appeal therefrom. And see also: *New and Used Auto Sales v. Hansen*, (CA 9th, 1957), 245 F.2d 951, involving a somewhat unorthodox use of the summary judgment procedure by the same District Court.

In discussing the above principles and decisions, Professor Moore observes that most of these cases reverse the trial court's grant of summary judgment, indicating that the trial courts had too freely granted summary judgment and allowed the procedure as an improper substitute for a live trial. If there is to be error at the trial level it should be in denying summary judgment and in favor of a full live trial. And the problem of overcrowded calendars is not to be solved by summary disposition of issues of fact fairly presented in an action.

6 *Moore's Federal Practice* 2120, 2121.

And see:

Petnel v. American Telephone & Telegraph Co., (SD NY, 1952), 13 FRD 249.

As has been shown above, the courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue to all the material facts, which, under applicable principles of the substantive law, entitled him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear as to what the truth is and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion *all inferences of fact from the proofs proffered at the hearing must be drawn against the movant in favor of the party opposing the motion.*

To satisfy the moving party's burden, the evidentiary material before the court, if taken as true, must establish the absence of *any* genuine issue of material fact, and it must appear that there is no real question as to the credibility of the evidentiary material, so that it is to be taken as true.

See:

6 *Moore's Federal Practice* 2123-2126 (and cases there cited).

The argument to follow will seek to demonstrate the applicability of the foregoing principles to the facts in the present case and the legal conclusions to be

drawn therefrom which, appellant contends, inevitably demonstrate that the judgment here appealed from is in error and should be reversed.

2. THE DISTRICT COURT ERRED IN FINDING AS A MATTER OF FACT, AND RULING AS A MATTER OF LAW, THAT BASED UPON THE RECORD PRESENTED, WITHOUT TRIAL, THERE WAS NO NEGLIGENCE ON THE PART OF APPELLEE, (DEFENDANT BELOW), BECAUSE THE ACCUMULATION OF SNOW AND ICE UPON APPELLEE'S SIDEWALK WHICH CAUSED APPELLANT'S INJURY WAS "NATURAL" IN CHARACTER; THAT APPELLANT (PLAINTIFF BELOW) WAS GUILTY OF CONTRIBUTORY NEGLIGENCE; AND HAD ASSUMED THE RISK OF HIS INJURIES, WHEN HE VENTURED UPON THE OBSTRUCTED SIDEWALK WITH KNOWLEDGE OF ITS CONDITION.

An examination of the record shows the following facts to be wholly uncontroverted: That on the day in question the appellant slipped and fell upon an accumulation of ice and snow on a sidewalk of the appellee City of Seward; that this occurred while appellant was lawfully proceeding upon such sidewalk; and that the serious injuries complained of resulted from such fall.

The following facts while controverted in the pleadings, are undisputed by the evidence insofar as there is any in the record: That the accumulation of ice and snow was of irregular shape, was packed and frozen, and so elevated, uneven, and ridged as to afford an insecure footing to those walking upon the sidewalk; that it had been permitted to remain, without removal or other remedial action by the appellee for the entire winter season; that there had been no recent addition to it, by precipitation, for at least

several days; that appellee knew, or by the exercise of ordinary care and diligence could have known, of the condition and failed to take any action to cure it; that it was not impracticable for appellee to remove the snow, particularly since it had already shifted the burden of actual removal upon the owners of adjoining lots and merely needed to enforce this ordinance in order to discharge its legal duty as a municipality (*vide supra*); that appellant's injuries resulted proximately from the failure of appellee to remove the obstruction and that such injuries were painful, serious and permanent; that appellant in traversing the obstructed sidewalk in question, the condition of which was known to him, was travelling the shortest distance from his point of departure to his point of destination; that the alternate routes, *e.g.*, along the middle of the street on Fourth Avenue or along the sidewalk on the Westside of Fourth Avenue were likewise hazardous or obstructed, namely, the street was covered with a sheet of ice formed when water used in a recent fire had frozen, the same condition applying to that portion of the sidewalk lying on the Westside of the street; that the street was further blocked by cars parked at a 30-degree angle; and that the sidewalk on the Westside of the street was obstructed by a similar accumulation as that situated on the Eastside, where appellant fell; that the climatic conditions of the locale of the accident are substantially similar to that experienced in many cities of comparable size within the northern and central parts of the United States (not directly raised by the pleadings, but uncontradicted by evidence).

The following facts (or inferences therefrom) are in dispute: Whether appellant knew before, or learned after his accident, that other persons had fallen previously at, or in the general vicinity of, the place where appellant fell; whether the alternate routes open to plaintiff were less, equally or more dangerous than the one selected by him with knowledge of the obstruction; whether appellant's election to use the sidewalk with knowledge of its condition, at the time and under the circumstances, and considering his footgear, weight, and physical capabilities, was such as to constitute a failure to use reasonable care under all the circumstances or amounted to a voluntary assumption of risk; whether the accumulation of snow and ice which caused appellant's fall was "natural" or was of such elevated, uneven and ridged nature as to impose upon the municipality (appellee herein) a legal duty of removal.

Likewise, there are a number of possible inferences or conclusions which may be drawn from the facts both disputed and undisputed. Inferences most favorable to the appellant (plaintiff below) would be that the accumulation of ice and snow which caused this fall was not a natural one, but rather was caused by the compaction of ice and snow, into an uneven and ridged obstruction, constituting a hazard or nuisance; that although knowing of the existence of this condition, appellant used ordinary prudence in choosing this, the shortest route, in preference to the other, equally known, hazards of glare ice and angle-parked cars on the street, and glare ice and similar snow and ice ridges on the opposite sidewalk; that

appellant used ordinary care and caution, under all the circumstances, in attempting to traverse the known obstruction on the East sidewalk; that plaintiff in electing one of several dangerous alternatives did not assume the risk of the fall and injury which occurred. As has been seen, contrary to the rules enunciated by the cases cited above, the District Court elected to resolve all these issues, and to draw all such inferences, in a manner adverse to appellant (plaintiff below).

There is a wealth of precedent available with respect to the basic issues of substantive law governing this case. Thus with respect to the legal duty involved, it was held early that a municipality is liable for injuries caused by accumulations of ice and snow on a sidewalk, making it slippery and unsafe. This is based upon the city's neglect to remove obstructions from such causes. The duty to do so is absolute and obligatory.

Collins v. City of Council Bluffs, (Ia., 1871),
7 Am. Rep. 200;

Finnane v. Perry, (Ia., 1914), 145 NW 494.

The foregoing rule has been generally followed, without deviation, and is supported by numerous later cases on this subject.

Suttmoeller v. St. Louis, (Mo., 1921), 230
SW 67;

Schroeder v. Hartford, (Conn., 1926), 132 A.
901;

Beane v. St. Joseph, (Mo., 1922), 240 SW 840;

Higgins v. Verdun, (Quebec, 1927), 65 C.S.
150;

Mesberg v. Duluth, (Minn., 1934), 254 NW 597;
Smith v. District of Columbia, (D.C., 1951),
 189 F.2d 671, 39 ALR 2d 773.

In order to render a municipality liable, the interference with travel must be unusual, that is to say, different in character from conditions ordinarily and generally brought about by the winter weather in the given locality. It is firmly established that whether or not an accumulation is out of the ordinary or is "natural" is a question of fact for the jury.

Anderson v. City of St. Cloud, (Minn., 1916),
 158 NW 417;

Cloughessey v. Waterbury, (Conn., 1884), 50
 Am. Rep. 38;

Townsend v. Butte, (Mont., 1910), 109 P. 969;

Harding v. St. Joseph, (Mo., 1928), 7 SW
 2d 707.

If snow and ice is permitted to remain until, either by the passing of pedestrians over it, or otherwise, the surface has become so rough or uneven that it is difficult or dangerous to pass over it, it constitutes a defect so as to render the municipality liable in damages to pedestrians who, in the exercise of ordinary care, are injured thereby; provided, the municipality has actual or constructive notice of the dangerous condition of the walk, and has had a reasonable opportunity to remedy the defect.

Smith v. Chicago, (CC ND Ill., 1889), 38 F.
 388;

Street v. Holyoke, (Mass., 1870), 7 Am. Rep.
 500;

- McManus v. Duluth*, (Minn., 1912), 179 NW 906;
- Smith v. Cloquet*, (Minn., 1912), 139 NW 141;
- Walsh v. Buffalo*, (N.Y., 1897), 44 N.Y.S. 942;
- Johnson v. Buffalo*, (N.Y., 1917), 165 N.Y.S. 372;
- Klaus v. Buffalo*, (N.Y., 1903), 83 N.Y.S. 620;
- Jackson v. Grand Forks*, (N.D., 1912), 140 NW 718, 45 LRA (NS) 75;
- Leclerc v. Montreal*, (Quebec, 1898), 15 C.S. 205;
- Touhey v. Medicine Hat*, (Alberta, 1912), 7 D.L.R. 759, aff'd 10 D.L.R. 691;
- Smith v. St. Joseph*, (Mo., 1923), 250 SW 616;
- Suttmoeller v. St. Louis*, (*supra*);
- Boyd v. Duluth*, (Minn., 1925), 204 NW 562;
- Buttmi v. New York*, (N.Y., 1931), 254 N.Y.S. 282;
- Randall v. Hot Springs*, (S.D., 1924), 199 NW 40;
- McDonough v. St. Paul*, (Minn., 1930), 230 NW 89;
- Speakman v. Dodge City*, (Kans., 1933), 22 P.2d 485;
- Woodring v. Duluth*, (Minn., 1947), 29 NW 2d 484;
- Moscon v. Philadelphia*, (Pa., 1942), 24 A. 2d 30.

With respect to the issue of notice, the long continuance of an observably dangerous condition has

been uniformly held to charge the city with constructive notice.

- McLoughlin v. Corry*, (Pa., 1874), 18 Am. Rep. 432 (all winter);
- McPherson v. Buffalo*, (N.Y., 1897), 43 N.Y.S. 658 (9 days);
- Llewellyn v. Wilkes-Barre*, (Pa., 1916), 98 A. 886 (4 days-1 week);
- Spencer v. Philadelphia*, (Pa., 1923), 120 A. 131 (1 month);
- Myers v. Des Moines*, (Ia., 1923), 193 NW 537 (3 weeks);
- Randall v. Hot Springs*, (*supra*), (5 days);
- Douris v. Butte*, (Mont., 1922), 207 P. 1001 (over 5 days);
- McClain v. Duluth*, (Minn., 1925), 203 NW 776 (6 days);
- Buffalo v. Des Moines*, (Ia., 1922), 186 NW 844 (6-7 days);
- Linton v. Jones*, (Ind., 1921), 130 NE 541 (several weeks);
- Keating v. New London*, (Conn., 1926), 133 A. 586 (several weeks);
- Smith v. District of Columbia*, (*supra*), (10 days);
- Denver v. Brubaker*, (Colo., 1935), 51 P.2d 352 (unspecified; possibly 48 hours).

Removal of snow and ice must be made by the city within a reasonable time.

- Touhey v. Medicine Hat*, (*supra*);
- Jackson v. Grand Forks*, (*supra*);

Lucy v. Norwich, (Conn., 1919), 106 A. 762;
Penor v. Glens Falls, (N.Y., 1910), 122 N.Y.S.
 1072;
Smith v. New York, (N.Y., 1953), 125 N.Y.S.
 2d 123.

Generally, the question as to whether or not the municipal corporation is liable in damages for the injury sustained is one of fact for the jury under the particular circumstances of each case.

Hawley v. Gloversville, (N.Y., 1896), 38 N.Y.S.
 647 (negligence of city);
Daly v. Des Moines, (Ia., 1918), 166 NW 712
 (same);
Denver v. Wilson, (Colo., 1927), 254 P. 153
 (same);
Parks v. Des Moines, (Ia., 1923), 191 NW 728
 (same);
Holland v. Auburn, (Wash., 1931), 297 P. 769
 (same);
Bull v. Spokane, (Wash., 1907), 89 P. 555, 13
 LRA (NS) 1105 (nature of condition, notice,
 proximate cause);
Rose v. Fort Dodge, (Ia., 1917), 155 NW 170
 (condition of surface, as against admission
 of plaintiff);
Byington v. Merrill, (Wis., 1901), 88 NW 26
 (condition of surface);
Smith v. D. C., (*supra*), (same);
Delacy v. Mason City, (Ia., 1949), 38 NW 2d
 587 (proximate cause);
Frechette v. New Haven, (Conn., 1926), 132
 A. 467 (notice);

Barrett v. Canton, (Mo., 1936), 93 SW 2d 927
(practicability of removal);

Alamosa v. Johnson, (Colo., 1936), 60 P.2d
1087 (same).

In an early leading case, decided by the Supreme Court of the State of New York, entitled *Williams v. City of New York*, (N.Y., 1915), 108 NE 448, the plaintiff had slipped and broken his leg on a sidewalk adjacent to a vacant lot between 138th and 139th Streets. The sidewalk was all covered with snow and hard ice, packed down and about two inches thick. The snow and ice had been there during five or six days before the accident. The last snowstorm previous thereto occurred about five or six days before; it was quite a heavy one. None of the snow was removed after the snowstorm and before the accident. The condition of the ice was rough, where people had packed down the snow, and ice had formed on top of it. There had been small flurries of snow and rain two days before the accident. It was held, per Bartlett, C. J., as follows:

“The jury would have been warranted in finding the facts as above stated. These facts show *prima facie*: (1) A dangerous and unusual condition of the street; and (2) the lapse of sufficient time to charge the city with constructive notice of that condition.”

“Another point argued against the plaintiff grows out of his conduct on the occasion of the accident. He had slipped down on the sidewalk just before he fell the second time and broke

his leg. He pursued his way along the icy sidewalk instead of crossing the street to a sidewalk which was entirely clear. This it is said, was contributory negligence, not merely justifying, but requiring the nonsuit. *It may have been contributory negligence as a matter of fact, but we think it was a question for the jury* (citing authority).” (Italics supplied.)

loc. cit., at p. 449.

Quoting from an earlier case, the New York court continued as follows:

“The general conditions of our variable winter climate, which are the work of nature, cannot be guarded against, but if the city should negligently suffer snow and ice to remain and accumulate in a particular place, until it became of a permanent nature and a dangerous obstruction to pedestrians, then it would be liable, and this is the measure of its liability. We think that this is precisely the condition of things which the jury might have found to exist in the present case.”

loc. cit., at p. 450.

Accordingly, the court reversed a judgment of nonsuit and granted the plaintiff a new trial.

Numerous other cases have ruled on the issue of contributory negligence incident to injuries arising when pedestrians were caused to fall on a slippery sidewalk. The general rule is stated to the effect that a pedestrian is not ordinarily required to forego the use of a sidewalk because of a known defect, but he may proceed under the requirement that he use care

commensurate with the known danger. Thus the pedestrian is entitled to use a sidewalk upon which there exists a ridge of ice, using proper care in so doing.

Muncie v. Hey, (Ind., 1905), 74 NE 250;

Dean v. Newcastle, (Pa., 1901), 50 A. 310;

Evans v. Utica, (NY., 1877), 25 Am. Rep. 165.

Whether or not a pedestrian exercised proper care in using the icy walk is a question for the jury.

Penor v. Glens Falls, (*supra*);

Powers v. Chicago, (Ill., 1886), 20 Ill. App. 178;

Brown v. White, (Pa., 1903), 55 A. 848;

Goff v. Little Falls, (N.Y., 1892), 20 N.Y.S. 175;

Isham v. Broderick, (Minn., 1903), 95 NW 224.

In the case of *McPherson v. Buffalo*, (*supra*), it was held to be well settled that one is not necessarily guilty of contributory negligence in attempting to pass over a walk which he knows to be in a slippery condition. It was there said by the court that a traveler has a right to use a sidewalk, although he knows that it is in an icy condition. To the same effect are the following cases:

Diffenderfer v. Jeffersonville, (Ind., 1918), 118 NE 836;

Evans v. Philadelphia, (Pa., 1903), 54 A. 775, 97 Am. St. Rep. 732.

The reason for this rule is often stated to the effect that sidewalks are constructed for people to walk on, and they have a right to walk thereon along the most

convenient route to reach their destination and, while they cannot recklessly place themselves in danger of accident, yet, on the other hand, they are not driven to forsake such walks, merely because there may be some danger in passing over them, and especially, when there is no safer route reasonably convenient.

Smith v. Yankton, (S.D.), 121 NW 848;

Jackson v. Grand Forks, (*supra*);

Lucy v. Norwich, (*supra*).

In the *Evans v. Philadelphia* case (*supra*), the court said that it is not contributory negligence for a pedestrian, with danger around him on all sides, not to select from all the dangerous paths the one which he ought to know is the least so. In any event, the cases hold, whether another and safer way was conveniently open to one who was injured by falling on a slippery sidewalk is a question for the jury.

DeWall v. Sioux City, (Ia., 1917), 164 NW 640;

Hampson v. Taylor, (R.I., 1885), 8 A. 331;

Twogood v. New York, (N.Y., 1886), 6 NE 275;

Kendall v. Albia, (Ia., 1887), 34 NW 833;

Williams v. New York, (*supra*);

Gordon v. Belleville, (Ontario, 1888), 15 Ont. Rep. 26;

Touhey v. Medicine Hat, (*supra*);

Steck v. Allegheny, (Pa., 1906), 62 A. 1115;

Smith v. Yankton, (*supra*).

It is, of course, basic that questions of negligence, contributory negligence, and assumption of risk are ordinarily questions of fact for the jury.

See, *e.g.*:

Ramsouer v. Midland Valley Railroad Co.,
(*supra*), (reversing summary judgment for
defendant in wrongful death action against
railroad).

Mr. Beach, in his venerable treatise on the subject of contributory negligence summarizes the rule to the effect that "knowledge of an existing danger or defective condition does not necessarily constitute contributory negligence. It is plain that one may exercise due care with full knowledge of the danger to which he is exposed or to which he lawfully exposes himself. This certainly is not contributory negligence. When knowledge is fastened upon the plaintiff, it is presumptive evidence of contributory negligence; but it is a disputable presumption and may be rebutted by proper evidence of the exercise of ordinary care under the circumstances."

Beach on Contributory Negligence, (3rd Ed.,
Rev.), pp. 56, 57 and cases there cited.

The same conservative text writer states the proposition that a pedestrian, in a city on a dark night, well acquainted with the unsafe condition of a sidewalk, is not guilty of contributory negligence in taking it as the most direct way to his home, instead of some other way also unsafe, if he acted with that care with which a prudent man should act; and this is a question for the jury (citing cases).

Ibid., at p. 57. (Note 9.)

Continuing, the text quoted above concludes that in general *it cannot be doubted that the question of contributory negligence is a question of fact and not of*

law. Whenever there is any doubt as to facts, it is the province of the jury to determine the question; or whenever there may reasonably be a difference of opinion as to the inferences or conclusions from the facts, it is likewise a question for the jury. It belongs to the jury, not only to weigh the evidence and to find upon the questions of fact, but to draw conclusions as well, alike from disputed and undisputed facts (italics supplied).

Id., at pp. 632-634.

The conclusion seems inescapable that the District Judge below was not aware of, or chose to ignore, these basic and elementary propositions of law.

The cases which have applied these fundamental principles to instances involving pedestrians walking on a known icy walk are legion; and they invariably hold that whether such acts constitute contributory negligence is always a question for the jury.

See *e.g.*:

Spencer v. Kansas City, (Kan., 1914), 139 P. 1029;

Brown v. White, (*supra*);

Welsh v. Amesbury, (Mass., 1898), 49 NE 735;

Smith v. Spokane, (Wash., 1897), 47 P. 888;

Coffin v. Palmer, (Mass., 1894), 38 NE 509;

Dewire v. Bailey, (Mass., 1881), 41 Am. Rep. 219;

Phillips Petroleum Co. v. Childress, (CCA 10th, 1935), 78 F.2d 861, 863;

Great Atlantic & Pacific Tea Co. v. Chapman, (CCA 6th, 1934), 72 F.2d 112, 114;

Palmer v. Edgerly, (N.H., 1935), 181 A. 125, 127.

To the same effect is the recent case of *Brittain v. City of Minneapolis*, (Minn., 1957), 84 NW 2d 646, where it was said that where reasonable men may differ as to what constitutes ordinary care and proximate causal connection upon the evidence presented, questions of negligence and proximate cause, as well as contributory negligence, are questions of fact for the jury; and it is only in the clearest of cases, where the facts are undisputed, and where it is plain that all the reasonable men can draw only one conclusion, that the question of negligence becomes one of law.

loc. cit., at p. 655.

Likewise, in a case involving an action for injuries sustained when the plaintiff slipped on ice while walking from the driveway of defendant's filling station to a gasoline pump, under evidence that as plaintiff was being helped up she observed that ice was under her and a little around her and that plaintiff had ample opportunity to reach the gasoline pumps safely and over an ice free path, the question of whether the plaintiff was guilty of contributory negligence in failing to notice and avoid the danger was for the jury.

Lord Baltimore Filling Station v. Miller, (App. D.C., 1940), 110 F.2d 698.

In this Honorable Court, in a case arising in Alaska, where the plaintiff fell through a hole in a wooden walkway which she knew to be in a rotted and dilapidated condition, it was held that the question of contributory negligence was properly one for the jury.

Alaska Treadwell Gold Mining Co. v. Mugford, (CCA 9th, 1921), 270 F. 735, 756.

The same rule has been held to apply with respect to the defense of "assumption of risk", which in this type of situation is often said to be merely another facet of the issue of contributory negligence. Thus the mere knowledge of the icy condition of a sidewalk has been held specifically not to preclude one from using the walk without assuming the risk of the dangerous condition.

Holbert v. Philadelphia, (Pa., 1908), 70 A. 746, 20 LRA (NS) 201.

Likewise, in a case involving injury to a plaintiff who walked across a passageway knowing it to be wet and slippery, a dismissal at the close of plaintiff's case was reversed by the highest court of the State of New Jersey, holding that *the principle of "assumption of risk" contemplates that one, with knowledge of a risk, or facts to put a reasonably prudent person on notice of risk, must exercise the degree of care that the risk requires. This is a question for the jury.*

Doherty v. Trenton Trust Co., (N.J., 1956), 126 A.2d 899, 902.

It seems evident from the foregoing authorities and the record in this case, that the District Judge would have committed reversible error had he deprived the plaintiff (appellant herein) of his right to the demanded jury trial with respect to *any one* of the material elements of his case as to which the facts, or at least the inferences from these facts, were in dispute, namely, the nature and origin of the obstruction; the question of contributory negligence; and the issue of assumption of risk, under all the circumstances of the case. Instead, the District Judge elected not

merely to draw legal conclusions, but even to make findings of fact, so designated, without the benefit of trial or the aid of a jury, to which appellant (plaintiff below) was constitutionally entitled and which he had expressly demanded. It would appear, in the words of Judge Hutcheson, in *Gray Tool Co. v. Humble Oil & Refining Co.*, (CA 5th 1951), 186 F.2d 365, that:

“* * * this is another of those all too numerous instances of the misuse of the summary judgment procedure to cut a trial short; * * * here, as so often before, it has served only to prove that shortcutting of trials is not an end in itself but a means to an end, and that in the conduct of trials, as in other endeavors, it is quite often true that the longest way around is the shortest way through.”

CONCLUSION.

Based upon the reasons and the authorities cited above, appellant earnestly contends that the summary judgment and the amended judgment in favor of the appellee (defendant below) should be reversed and the cause remanded with instructions that it be set for *early trial* by a jury.

Dated, San Francisco, California,
June 30, 1958.

Respectfully submitted,

EDGAR PAUL BOYKO,
Of Attorneys for Appellant.

No. 15854

United States
Court of Appeals
for the Ninth Circuit

HAL GILFILEN,

Appellant,

vs.

CITY OF SEWARD, a Municipal Corporation,

Appellee.

Transcript of Record

Appeal from the District Court for the
Territory of Alaska,
Third Division

FILED

APR - 9 1958

PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Affidavit in Support of Defendant's Motion for Summary Judgment	46
Answer	6
Attorneys, Names and Addresses of	1
Clerk's Certificate Original Record	55
Clerk's Supplemental Certificate	56
Complaint and Demand for Jury Trial	3
Deposition of Gilflen, Hal	9
Findings of Fact and Conclusions of Law	48
Judgment	50
Judgment, Amended	53
Motion for Summary Judgment	44
Notice of Appeal, Filed September 30, 1957 ...	51
Notice of Appeal, Filed October 22, 1957	54
Statement of Genuine Issues	45
Statement of Points on Appeal	57
Stipulation, Filed October 8, 1957	52
Stipulation, Filed February 11, 1958	58

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CHARLES A. LEGGE,

BRONSON, BRONSON & McKINNON,

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San Francisco, Calif.

In the District Court for the District
of Alaska, Third Division

Cause No. A-11,718

HAL GILFILEN, an Individual,

Plaintiff,

vs.

CITY OF SEWARD, an Alaskan Municipal Corporation,

Defendant.

COMPLAINT

Plaintiff complains of the defendant, and for cause of action alleges:

I.

That at all times hereinafter mentioned defendant was, and now is, a municipal corporation organized and existing under the laws of the Territory of Alaska.

II.

That at all times hereinafter mentioned there has been located within the corporate limits of the defendant city a much used public street and highway known and designated as Fourth Avenue, which said Fourth Avenue had laid out upon it, along its east side, a public sidewalk extending parallel to said Fourth Avenue.

III.

That the public street and sidewalk referred to in paragraph II had, for many years prior to February 12, 1954, and at all times since then, has been treated

and controlled by defendant city as a public street, highway and sidewalk.

IV.

That, on the 12th day of February, 1954, and for a long period of time prior thereto, snow and ice had accumulated upon the sidewalk referred to in paragraph II to such an extent that travel over, across, and upon the same was insecure and unsafe for pedestrians in that said snow and ice was accumulated upon said sidewalk in an irregular shape; was packed and frozen, and so elevated, uneven, and ridged as to afford an insecure footing to those walking upon the said sidewalk.

V.

That defendant knew, or by the exercise of ordinary care and diligence, could have known, of said unsafe condition of said sidewalk and could have removed said snow and ice in a reasonable time before the plaintiff slipped and fell as hereinafter stated.

VI.

That on the 12th day of February, 1954, at about the hour of eight o'clock p.m., the plaintiff was carefully and lawfully walking in a northerly direction on the aforesaid sidewalk when, at a point abutting the property, legally described as the north 15' of Lot Twenty-seven (27), Block Nine (9), Seward Townsite, owing to the aforesaid unsafe condition of the sidewalk, plaintiff slipped and fell on his left hand and wrist.

VII.

As a result of such slipping and falling plaintiff had his wrist broken, his elbow dislocated, received a chipped bone in his shoulder, and was otherwise injured, and still has a partial disability from such injuries; was prevented from transacting his business; suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization.

Wherefore, plaintiff prays judgment against defendant as follows:

1. For the sum of \$7,166.10 for medical attention and hospitalization expenses incurred.
2. For the sum of \$13,675.00 for wages paid to a substitute while plaintiff was prevented from transacting his business.
3. For the sum of \$25,000.00 for pain and suffering.
4. For costs of this action.
5. For such other and further relief as in the premises are just.

McLAUGHLIN & ATKINSON,
Attorneys for Plaintiff;

By /s/ KENNETH R. ATKINSON.

United States of America,
Territory of Alaska—ss.

Now, on this 16th day of December, 1955, Hal Gilfilen, being first duly sworn, on his oath deposes and says: That he is the plaintiff named in the foregoing complaint; that he has read the same, knows the contents thereof, and that the same is true as he verily believes.

/s/ HAL GILFLEN.

Subscribed and sworn to before me this 16th day of December, 1955, at Anchorage, Alaska.

[Seal] /s/ KENNETH R. ATKINSON,
Notary Public in and for
Alaska.

My commission expires: September 2, 1959.

Plaintiff demands a jury trial in this cause.

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause.]

ANSWER

The defendant, City of Seward, for answer to the plaintiff's complaint admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I.

II.

Admits the allegation contained in Paragraph II.

III.

Denies the allegations contained in Paragraph III.

IV.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV and the same are therefore denied.

V.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V and the same are therefore denied.

VI.

Denies all allegations contained in Paragraph VI except that the plaintiff slipped and fell on February 12, 1954.

VII.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VII and the same are therefore denied.

First Affirmative Defense

Defendant alleges that any injuries or damage sustained or suffered by the plaintiff at the time and place and on the occasion alleged in his complaint, were caused in whole or in part, or were contributed

to, by the negligence, fault, or want of care on the part of the plaintiff, and not by any negligence, fault, or want of care on the part of the defendant.

Second Affirmative Defense

Defendant alleges, that if in fact, said sidewalk was in an unsafe condition as alleged in plaintiff's complaint, that plaintiff had full knowledge thereof, or by the exercise of ordinary care and diligence could have known the condition thereof, and yet with such knowledge plaintiff nevertheless voluntarily chose to use such sidewalks; that if in fact plaintiff sustained the injuries and damages alleged in his complaint they were caused by a risk or chance which he well knew and plaintiff at the time of using said sidewalk had voluntarily assumed all risk or chance incidental to or arising out of the use thereof.

Wherefore, defendant having fully answered plaintiff's complaint prays that plaintiff take nothing thereby and that defendant have and recover of and from the plaintiff his costs and disbursements herein, including a reasonable attorney's fee to be fixed by the court.

/s/ RAYMOND E. PLUMMER,
Attorney for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed January 26, 1956.

In the District Court for the District
of Alaska, Third Division

No. A-11,718

HAL GILFILEN, an Individual,

Plaintiff,

vs.

CITY OF SEWARD, an Alaskan Municipal Corporation,

Defendant.

DEPOSITION OF HAL GILFILEN

Appearances:

KENNETH ATKINSON, of
McLAUGHLIN & ATKINSON,
For Plaintiff.

RAYMOND E. PLUMMER,
For Defendant.

Pursuant to Notice, hereto attached and made a part of this deposition, the deposition of Hal Gilflen was taken before Gara H. Lyon, Notary Public in and for the Territory of Alaska, at the office of Raymond E. Plummer, 225 Central Building, Anchorage, Alaska, on this 23rd day of February, 1956, at the hour of 2:00 p.m.

PROCEEDINGS

HAL GILFILEN

being first duly sworn on oath, by Gara H. Lyon,
Notary Public, deposes as follows:

Direct Examination

By Mr. Plummer:

Q. Will you state your full name for the purposes of the record? A. Hal O. Gilflen.

Q. How long have you resided in Seward?

A. Ten years December 1st—last.

Q. And you are the plaintiff in a case entitled Hal Gilflen, an individual, plaintiff, vs. City of Seward, an Alaskan Municipal Corporation, defendant? A. Yes.

Q. What is your present occupation or business?

A. I have varied business interests. I own two pieces of business property, also Gil's Lounge, an apartment house and office building. I did have the Gateway Drug Store in my building.

Q. That is all in the City of Seward, is it?

A. Yes.

Q. Were you engaged in the same business on February 12, 1954? A. Yes; I was.

Q. Did you on that date fall and injure your left arm and wrist? A. Yes. [2*]

Q. And where was it that you fell?

A. About five or six feet north of what we call the Alaska Shop—between that and another build-

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Deposition of Hal Gilflen.)

ing. It is in a vacant piece of property. On Fourth Avenue.

Q. Can you recall the approximate time this occurred?

A. It seems to me that it was about 8:15 p.m.

Q. Please state in your own words the facts and circumstances pertaining to your fall?

A. I had left my place of business and was going up, or rather north, to a store that I own the license in, a retail liquor store, where my wife and a lady were visiting. I stepped up into the ice flow that exists in front of this piece of property. When I had taken several steps, about three as I recall, there my feet went straight up. I threw out my arm to catch myself and at that time I weighed 210 pounds and I lit with my hand and also injuring my wrist and hand, dislocated the elbow and had several other impacts which the doctors have arrived at. I was picked up by a man named Ray O'Hara who is the City Manager of Seward and was taken to the Seward General Hospital where they called Dr. Francis J. Phillips, and after giving me a sort of sedative he attempted to X-ray my wrist and elbow, which by this time had swollen considerably. Do you wish a continuation, Mr. Plummer, of this thing other than just the fall?

Q. Just the fall at this time. You referred to Fourth Avenue. I believe this happened on the East side of Fourth Avenue? [3]

A. Yes.

Q. Would you draw us a sketch of Fourth Ave-

(Deposition of Hal Gilfilen.)

nue, showing your place and where the Alaska House is, etc.? (Witness draws diagram.)

A. Maybe this will do it. Here is the apartment house and I came out of the doorway here and went past the Alaska House or Shop. (Witness explains diagram.)

Q. Can you draw the sidewalk and approximately where your store is?

A. I was proceeding along the sidewalk—this is not located——

Q. Well, then, will you erase the first line there, please?

A. Yes. It seems to me that, as I recall, I was very near the center of the sidewalk, the lowest portion of which was grooved out some.

Q. What is the place to which you were going?

A. Gil's Liquor Store.

Q. Will you put that on, please, there together with the sidewalk? One further thing. Will you put the directions on there?

A. North and South?

Q. Yes.

A. I believe it almost due North, however, it is just a fraction off.

Q. Then while you still have it, will you sign it and date it?

A. What day is this—the 25th?

Q. (By Mr. Atkinson): The 23rd.

A. The 23rd.

Q. Now, I believe you stated that immediately prior to your fall, or the place you left prior to your fall was Gil's Lounge?

A. Yes. [4]

Q. And how long had you been there?

(Deposition of Hal Gilflen.)

A. I live there in the rear of my place of business.

Q. Had you been working on the bar?

A. No, I had been in the process of completing some finish work on the drug store—on the new building.

Q. The name of the place you were going to was what? A. Gil's Liquor Store.

Q. Had you consumed any intoxicating liquor on the 12th day of February, 1954? A. None.

Q. And you say you were living in the rear end of the Lounge? A. Yes.

Q. So the place you fell would be to the north of your place of business? A. Yes.

Q. That is, one of your places of business?

A. Yes. One-half of an eighty foot building is the Lounge and the other half is apartments.

Q. Will you please state the names and addresses, if you know that, in whose company you had been or who had been in from five p.m. until the time the accident occurred?

A. That will be a little difficult to remember. I am sure of one—Orville Smith—who is an employee of mine. I do not recall who else was there at the time although the place was quite well filled. [5]

Q. Could we do this then—leave this question open and if you recall any other persons' names, will you submit them to Mr. Atkinson?

A. Yes, I expect it could be that I will recall several of them.

(Deposition of Hal Gilfilen.)

Q. Do you recall the day of the week? It fell on a Friday, did it not?

A. Yes. I was aware of it being Lincoln's Birthday.

Q. Can you recall the day or the approximate number of days prior to your accident when snow last had fallen in Seward?

A. I don't think I can.

Q. Well, can you recall whether it was a matter of days or a matter of weeks?

A. Well, it was not too far back; however, as I recall the sidewalk there had not been cleaned all season. I had cleaned my place but there was a good eight inches of packed snow there at that time—actually was ice. It's still there today. There was four and a half or five inches of ice when I left there the other day. It is all packed and frozen.

Q. Could you—strike that—then would you say that this accumulation of snow and ice was not removed at any time?

A. All winter long.

Q. Will you state the number of times you walked past the point where you fell during the thirty days prior to the day you fell?

A. I would say most every day.

Q. Do you recall or do you have any recollection as to the temperature [6] in Seward on February 12th?

A. I am quite sure it was freezing temperature and damp. Somewhere close to the thirties.

Q. Near the thirties or below?

(Deposition of Hal Gilfilen.)

A. Near, I would say. I am not too sure about that.

Q. Had the temperature been about the same for a two-week period prior to the accident?

A. If I recall properly it had warmed up and made it a little slick there. It seems to me that it had. However, I had been working indoors all that portion of the weather and I was not too aware of conditions. I just didn't pay too much attention to it.

Q. Now, in your complaint, I call your attention to Paragraph IV, starting on page one and going over on page two. You have alleged "that on the 12th day of February, 1954, and for a long period of time prior thereto, snow and ice had accumulated upon the sidewalk referred to in Paragraph II to such an extent that travel over, across and upon the same was insecure and unsafe for pedestrians in that said snow and ice was accumulated upon said sidewalk in an irregular shape, was packed and frozen and so elevated, uneven and ridged as to afford an insecure footing to those walking upon said sidewalk." Is that a true statement?

A. Yes.

Q. Do you make that statement based upon your own knowledge and observation?

A. Yes, sir [7]

Q. And this condition of the sidewalk as to accumulated ice was plainly visible, was it not?

A. Yes, sir.

Q. To your knowledge had anyone in Seward fallen at this particular point because of this ice

(Deposition of Hal Gilflen.)

and snow? A. Yes.

Q. Will you give me the names of such persons, if you know, and the dates they fell?

A. Well, Lola LeQuier for one, and my wife, Claire, the same night I fell. As a matter of fact she was coming down the street to see how I was going.

Q. Do you recall whether Mrs. LeQuier fell before or after February 12th? A. Before.

Q. It was at this same point?

A. I believe so. At least she was handling the taxicab company which rented space from my building. It was about the same place. There was the distance of the Alaska Shop between the cab office and where she fell.

Q. Was the cab office in the old Palace Cafe?

A. No, south of the Alaska Shop and adjacent to it. In the portion of the red brick building that I own.

Q. Other than your wife and Mrs. LeQuier do you know of any other persons who fell at this point?

A. I have—I remember someone coming in and telling me they had. [8] I just don't remember who. I believe someone reported to Pat Williams, the insurance claim adjuster, they had fallen. It is a hazy recollection. I am not too positive.

Q. Can we leave that open, also, and if you recall any additional names will you supply those to Mr. Atkinson so I might obtain them? There is no need to prolong this. A. Yes.

(Deposition of Hal Gilfilen.)

Q. Now, had you prior to the time you fell there called this to the attention of any city official?

A. Yes, I had. I was a member of the Planning & Zoning Commission at the time this happened and I had discussed it on perhaps two or three occasions with other members of the commission. We discussed some way or a request that the Council enforce that ordinance.

Q. To enforce the ordinance in general or at that particular place?

A. Not that particular instance. All the vacant properties. There were some flagrant violators on that side of the street which made it very difficult to maintain.

Q. How many other vacant properties were there on the east side of the street?

A. Well, there was a lot next to the Seward Plumbing & Heating that was vacant.

Q. Was that to the north?

A. Just beyond the liquor store. Then on the south end there was a vacant corner 90' by 100'. We took up one directly across [9] from the bank on 4th—a vacant corner, and discussed ways and means of getting it removed and now they have.

Q. Is that the last lot on the west side of the store and north of the Seward Steam Laundry?

A. Yes.

Q. And it is your recollection this was discussed among the members of the Planning and Zoning Commission?

A. Yes.

(Deposition of Hal Gilflen.)

Q. Where—who were the members of that commission?

A. Robert Baumgartner, the attorney, was chairman of that group. I don't know whether Pat Williams was still a member at that time or not. It seems to me she was. I know she was an original member of it. Another was Vance Hitt. Jack Werner but he resigned when he went to Juneau. I am just not sure. There were seven members of the board but they have changed some. I think Bob Stanton was on it.

Q. Who owned the property abutting or adjacent to the sidewalk where you fell?

A. It is my understanding Robert Baumgartner owns it.

Q. What type of foot gear were you wearing, to the best of your recollection, at the time of your falling?

A. I was wearing a pair of brown oxfords. I didn't have boots on—because—just oxfords. I don't recall whether or not I had on rubbers. A check with the doctor might enlighten me on that.

Q. Then it is your recollection that you were just wearing oxfords [10] and that possibly by checking with Dr. Phillips or at the hospital you find you were wearing rubbers?

A. I recall they undressed me at the hospital, but I am not just sure what I had on.

Q. Can you recall the velocity of the wind at eight p.m.?

A. There was no indication of any, as I recall.

(Deposition of Hal Gilfilen.)

Q. Now, calling your attention to Paragraph V of your verified complaint, you allege, in part, that the defendant, meaning the City of Seward, "knew or by the exercise of ordinary care and diligence could have known of said unsafe condition of said sidewalk * * *" Is that a true statement?

A. Undoubtedly they knew of its condition.

Q. And by that you mean that the City of Seward likewise should have known of that condition?

A. I am sure they did.

Q. I believe you previously stated that the accumulation of snow and ice, which was practically all ice, was about eight inches in depth?

A. Yes.

Q. I believe you also testified that the remainder of the sidewalk on the east side of Fourth Avenue, except adjacent to the vacant lots in that particular block, snow had been removed?

A. Yes, it had been.

Q. Was this likewise true of the sidewalk on the west side of Fourth opposite the point where you fell? Was the sidewalk cleared there? [11]

A. In part—with the exception of that area I mentioned before. I am sure all of it was kept clean in front of the stores. I know that we neglected ours for one day the police would serve us with notices. As a matter of fact I have a copy of one of the notices.

Q. Am I clear that on the west side of Fourth Avenue the only vacant lot is at the extreme north end beyond the Seward Laundry? A. Yes.

(Deposition of Hal Gilfilen.)

Q. I believe you have already stated you had taken two or three steps from the point where the sidewalk was cleared to the point of your fall or in the neighborhood? A. Yes.

Q. What is the approximate total length of that area where the snow and ice was accumulated where you fell?

A. Twenty-two feet is the length of that lot.

Q. Could you write that in, showing the distance?

A. Yes. And incidentally that twenty-two feet that I refer to, I am sure, is the amount owned by Mr. Baumgartner. Another short section was retained by Mr. Matich when he built the Palace Cafe.

Q. Were there any eye witnesses to your fall?

A. Yes.

Q. Will you please state their names, if you know?

A. There was one who was a taxicab operator with the Northern Cab Company whose last name—some man by the name of Woods, that is the only name I know. In fact, all I know is “Woody.” [12] Arnold Berne is another.

Q. Anyone else?

A. The City Manager did not witness the fall. He came by when they were picking me up. This man Woods helped me get back on my feet.

Q. Then those two are the only ones you know, Mr. Berne and Mr. Woods?

A. Mr. Berne was sitting in a car directly by

(Deposition of Hal Gilflen.)

where I fell and facing the walk. You know we have 30-degree angle parking.

Q. Then Mr. Woods arrived at the point where you fell before Mr. O'Hara did?

A. Yes. He was stationed in front of the Alaska Shop entrance about fifteen feet from where I fell.

Q. Do you know Mr. Berne's address? Does he still reside in Seward?

A. He and his brother own the Seward Laundry.

Q. You are pretty sure he still resides in Seward? A. I am quite sure.

Q. Will you obtain that information and give it to Mr. Atkinson? A. Yes.

Q. Do you think you can obtain Mr. Woods' full name?

A. Yes. He worked for the Legion Cab and Woods is an employee now. I believe, on the new dock construction.

Q. Did anyone accompany you to the hospital?

A. Yes, Mr. O'Hara drove me there in his car—the City Manager.

Q. Was Dr. Phillips there or did someone call him to the hospital? [13]

A. I think he was there—in fact I am quite sure.

Q. Did Mr. O'Hara remain with you?

A. Yes, for a full hour.

Q. How long did you remain there?

A. All night.

Q. Dr. Phillips had completed his examination

(Deposition of Hal Gilflen.)

then, including X-rays, prior to the time that Mr. O'Hara left?

A. Yes, and my wife was there also while the doctor was taking an X-ray and giving me a shot. And Mrs. Losey, the lady who operates Gil's Liquor Store.

Q. What, if anything, did the doctor state as to the nature and extent of the injuries you sustained in the fall you described?

A. I believe that would have to be contained in his report which I am sure he will submit. I couldn't give it in the proper language. I might not—I couldn't describe it fully enough.

Q. Were you confined in the Seward Hospital other than overnight? A. That is all.

Q. When you returned—when you left there and returned to your home to convalesce?

A. Yes.

Q. Did Mr. O'Hara at any subsequent time contact you and visit you to see how you were getting along?

A. Yes, almost daily for a couple of weeks.

Q. That was immediately after the accident?

A. Yes. [14]

Q. Did you on any occasion tell him or relate to him the nature and extent of the injuries you had received?

A. No, I didn't. I didn't know myself. I was sure of the dislocation of my elbow because it was bent badly—back toward my shoulder.

(Deposition of Hal Gilflen.)

Q. What, if anything, did Dr. Phillips do for this? Did he put it in a splint, for instance.

A. He splinted the elbow and after reading the X-rays he said that he wanted to send them to a bone specialist because he was not sure of his own reading. He sent them air mail to a Dr. Harmon. He is a specialist but I don't know his address. I could get it. Dr. Phillips got back a report from Dr. Harmon but I am not too well versed on the phraseology of it. I do know there was a dislocation of the elbow and considerable injury to the wrist and it was so painful in the wrist area that I couldn't use it or move it. It was badly swollen and they rigged up a splint to the whole hand. It was considerably benefitted with an Ace bandage which I wore about a month. I also wore a modified elbow sling, which I still have. After talking to the other doctors we rigged it up and fastened it around my body. I slung it up because I had so much pain at the shoulder and was trying to relieve the pain but that didn't seem to do very much good. As a matter of fact as it eventually turned out that didn't help a bit. There was continual swelling that never did stop. It was so swollen and turned green that they were afraid of the loss of [15] my arm through complications. I was advised to find someone to cure it, Dr. Phillips being very busy as the chief surgeon at the Sanitarium and while he, perhaps, did everything he could, I was advised to seek someone who could do me more good. I was advised from a friend who is a doctor in private practice

(Deposition of Hal Gilfilen.)

and who was a guest in our home. His name is Dr. Joseph Sheldon and he is a man who used to be a general physician in Seward and my wife was employed by him two years as office nurse. He was not our doctor but just a friend but he tried to assist the doctor in getting some apparatus and getting my arm into it. It was not part of his work, nor did he treat me.

Q. Can you obtain the address of this Dr. Harmon to whom the X-rays were sent and supply it to Mr. Atkinson, who, in turn, can furnish it to me?

A. Yes.

Q. Now what is the official capacity of Mr. O'Hara? A. He was the City Manager.

Q. Was he serving in that capacity on February 12, 1954? A. Yes, sir.

Q. Did he continue in that capacity until the time, or about the time, he left Seward?

A. Yes, he did.

Q. Do you remember when he resigned or left there?

A. It was in my absence but I believe it was the 2nd of April or about that time. He left right after the first—along there. [16]

Q. Will you please state the date, or approximate date, when you communicated to the City of Seward that you intended to hold them liable for your injury?

A. I had proceeded to Seattle to continue treatment with a Dr. Buckner, who is a specialist in orthopedic and bone surgery——

(Deposition of Hal Gilfilen.)

Q. When was that?

A. April 6, 1954. And on arriving there I learned that Dr. Buckner was in Sun Valley, Idaho, and had retired. In his stead there was a Dr. B. E. McConville. I had with me a jacket file from Dr. Phillips explaining the nature of the injury and also the X-rays, which Dr. McConville examined that same day I arrived there and he took a series of X-rays of his own. His findings were considerably more, I believe, than had been noted at the time the thing was so swollen and so painful that the first X-rays didn't get it all since it was not under the machine properly. After seeing those he did, according to my understanding, and his determination it appeared that they had better have waited until sometime afterward to place me in position to take the X-rays to show the damage.

Q. When was it with reference to your trip to Seattle that you made known to the City of Seward your intention to hold them liable?

A. I wrote to the City of Seward and that letter is a matter of record. I don't recall the exact date but they have it, I am sure. I have their answer requesting assistance and further care to the injury. When I learned it was of considerable [17] extent, more than I had imagined and would require considerable treatment and I was not able to finance myself too much longer and I wrote and requested assistance from them. I know they wrote a letter to their insurance company and I know I have one of

(Deposition of Hal Gilflen.)

theirs which I received afterwards and they offered assistance.

Q. This is on your trip out in April of 1954?

A. It could have been that one or a subsequent one. I made four in all. Actually, I believe it was on the second one. Maryland Casualty had an agent, one of their young men, named Sullivan, contact me.

Q. You think that was on your second trip?

A. I believe so.

Q. When did you make your second trip out?

A. In July.

Q. Now, with reference to the letter you wrote, was that right after your return to Seward or while you were still in Seattle?

A. I wrote them from Seward, I am quite sure. I wrote after I returned to Seward and learned it was not as cured as I thought.

Q. How long did you remain in Seattle on your first trip—the April 6th one?

Mrs. Gilflen: He went out the 6th of April and came back the 29th of May.

A. Let me have this file and I can tell you. I left Anchorage on the 7th. Wait a minute—that isn't the right one. Here we are. It was May 29th I left Seattle. [18]

Q. During that period of time had you seen any other doctor than Dr. McConville or were you only under his care?

A. In Seattle?

Q. Yes.

A. Well, there were several doctors in the office of Dr. McConville. Dr. McConville himself and Dr.

(Deposition of Hal Gilflen.)

Fletcher and Dr. Callahan, who examined me. It, incidentally, was not a thorough examination. It was more a confirmation of the fact that they could not manipulate the elbow and keep the accretion of fluid in that joint without either going into it or using needles. They discussed it as they took turns in examining it. I was unable hardly to stand the therapy treatment, it was so painful the first time I was out.

Q. From whom were those therapy treatments taken?

A. The therapist's name is Ed Turnsen. I was sent to Room 222 in the Cobb Building.

Q. And were you treated by any other doctors while in Seattle on that trip?

A. No other doctors, no.

Q. What course of treatment did they pursue, if any?

A. A series of intravenous shots daily for—let me try to get the exact time, if I can. I believe it was about nine months until I could quit. I had calcium gluconate, cortisone, ACTH and Vitamin B-12. I certainly did have my system full of it. I had those daily five days a week and therapy treatments [19] concurrent with that every day. I followed those treatments through after returning to Seward at the Seward San. The therapist there is a Mrs. Aylen. I also continued the intravenous treatments which were given first by Dr. Hall and then by Dr. Staff who took his place.

(Deposition of Hal Gilflen.)

Q. The last two doctors you mentioned—they were at Seward?

A. Yes, and I came back from Seattle with instructions from my doctors, in writing, to them. They have correspondence as to how they were to proceed with the treatments.

Q. When did you make your second trip?

A. I left Anchorage on the 7th. The tickets were purchased in Seward on the 6th and I left here on the 7th of July.

Q. How long did you remain in Seattle that time?

A. Until the 21st of August.

Q. Under whose care were you at that time?

A. Dr. McConville.

Q. Anyone else?

A. No.

Q. Then when was your third trip outside made?

A. The 21st of February, 1955?

Q. The 21st?

A. Yes, that is leaving Anchorage. That is the date on the airline ticket.

Q. And when did you return to Seward?

A. The 26th of March. [20]

Q. Going back to the second trip out, what course of treatment did Dr. McConville pursue then?

A. It was a continuation of the intravenous shots but there was a change in the medicines because the others were creating such a physical disorder that I was unable to eat properly and I had lost thirty pounds of weight and my hair had

(Deposition of Hal Gilfilen.)

turned white. He was a little afraid it was the wrong medicine and it sure was.

Q. Then he changed the medicine?

A. He made a complete re-examination and ordered an allergy test. Oh, that was the third time I had to go back because of this terrific disorder. I couldn't eat anything that would not make me ill. I was aware of what was causing the trouble because I seemed to have a terrific gastric upheaval from my stomach. We learned that the milk which I had been drinking was killing me, slowly but surely because I was too full of calcium. I love milk and cheese and all these foods were overacting, so they changed completely the shots I was getting. And they put the shoulder bone into the socket.

Q. By whom were you attended between the second and third trips?

A. Between the trips to Seattle, you refer to?

Q. Yes.

A. In the first instance by Dr. Staff and Mrs. Aylen, the therapist.

Q. While you were in Seattle on the third trip who attended you? A. Dr. McConville.

Q. Anyone else? [21]

A. No—and Ed Turnsen, the therapist.

Q. What was the course of treatment during that period of time?

A. I am getting confused on the amounts and types of treatment. I am sure you can get that very minutely from his daily records that were kept. I know he has a file, quite complete.

(Deposition of Hal Gilflen.)

Q. After the third trip, when you returned to Seward, under whose care were you—who was the doctor? A. It was still Dr. Staff.

Q. Then when did you make your fourth trip outside?

A. July the 16th, in 1955. It was the 18th out of Anchorage. The 16th is the date of purchase on this ticket.

Q. What date did you return?

A. August 25th.

Q. And what doctors cared for you while you were in Seattle during that period of time?

A. Dr. McConville.

Q. Anyone else?

A. No, other than I am also making reference to a very fine therapist. I drove over to Soap Lake in an attempt to relieve myself of pain during this treatment. This stemmed from Ed Turnsens, the therapist, who had two other patients he was taking over there. In discussing in his office ways of removing arthritic pain with heat, sunshine and therapy he mentioned this and I made a three-day trip with them in his car. I found that the waters at Soap Lake did relieve it somewhat, to an extent that [22] when I returned to Seattle I could take the whirlpool baths and therapy without quite so much pain. I suggested to the doctor that I try it again and he said "If it helped you, by all means try it over again."

Q. Is this Mr. Turnsens a physicians?

A. He is not a doctor. He is a therapist. Dr.

(Deposition of Hal Gilflen.)

McConville was the doctor. I had been taking ACTH alternately with cortisone shots to relieve the extreme pain. It was bone pain, right in the bone. They tried to get at with needles and they sure did. They used them continually. It was so painful for any manipulation of the arm or wrist or elbow and I could not lift my arm up to the shoulder. It was infected which was not suspected at first but in attempting to arrive at a cure they learned the shoulder was infected. There was so much pain it was impossible to determine where all of it was. I am aware of it because that shoulder is the serious part remaining, that and the elbow. The elbow will not bend except to a restricted degree.

Q. After you returned to Seward on the 25th of August, under whose care were you at that time.

A. Dr. Hall. No, no, that is not right. No, Hall was in between the third and fourth trips.

Q. After the fourth trip?

A. After the fourth trip I have not had any doctor in Seward either examine me or discussed it with any. I have communicated with Dr. McConville on several occasions since returning home [23] and describing the ache and how my arm was behaving, and advising him of the pain remaining and the restricted use.

Q. Have you been examined by any doctor since August 25th? A. None.

Q. What course of treatment have you followed since 1955?

A. I purchased an elastic exercising rubber rope

(Deposition of Hal Gilfilen.)

affair, with a rubber rope going through a pulley on the floor and with handles. I use it quite a good deal. In fact I have almost worn the darn thing out. It keeps up the muscular use of the arm, although it is not clear yet at the elbow and shoulder joints.

Q. When, after August, 1955, were you first able to work?

A. I have not returned to full work. I have done four hours a day duty. I have done relief work on my bar. I was able to employ a crew and complete the construction of my building. I laid a portion of the cement in the basement floor and in that connection, I mean I screened the cement down. I tried to shovel and was good for just one day. I tried to get back to doing that kind of work but I am just no good at construction at all any more and I had to give it up, and that was my field.

Q. Prior to the February 12th injury—since February 12th have you regularly tended bar?

A. I have gone in there each time I returned home and I was able to do certain types of work but I couldn't carry cases or boxes of garbage. I hadn't been regularly employed on the bar because I was building a two-story steel and concrete structure which [24] was to have the Gateway Drug, two attorneys' offices and some others, as well as seven apartments upstairs also over the present building.

Q. How long prior to February 12th had you started your construction work and stopped tending bar?

(Deposition of Hal Gilflen.)

A. I started June 1st, but I did relief shifts. In fact you just don't go out on the street in a place like Seward and hire bartenders. You have to have someone who knows what it is all about. So I did work at nights, even during the construction work. I worked all day on the building and nights on the bar.

Q. I believe you mentioned a date in July, or was it June—what year?

A. 1953, wasn't it Claire?

Q. A moment ago you said that each time, on returning to Seward from Seattle, you did certain types of work in the bar, but you couldn't carry cases of beer or liquor?

A. Yes.

Q. But you did work in the bar?

A. I tried to do so, but I would break so many glasses. I had no feeling so that unless I was watching and would look directly at something I would pick it up and then drop it. The first and second fingers and the thumb of the left hand have no feeling, it was just a numbness.

Q. Now, some place in your testimony you mentioned you had written a letter to the City Manager, putting them on notice of the fact [25] that you were going to hold them liable for your injury. I have a copy of the letter here. Will you read it and after you read it, state whether or not it is the letter you referred to with the exception of the red notation?

A. Yes, it is.

Q. Have you—strike that—was that the first time you had communicated or made known to the

(Deposition of Hal Gilflen.)

City of Seward the facts and circumstances of your injury?

A. No. I had written them previous to this. Without identifying anything I will say that as a matter of courtesy I had let them know I was going to return to Seattle for further treatment. I don't know the date of the letter but I recall writing it.

Q. Was that between the first and second trips that you made to Seattle?

A. After the first trip. However, I think I had written a letter before I went out stating that I had slipped and fallen. I notified them several times.

Q. Then undoubtedly the City Clerk would have copies? A. Yes.

Q. Do you have copies?

A. I am not sure. I usually keep them.

Q. Then to the best of your recollection you wrote them before you made your first trip out?

A. Yes.

Q. Now, with reference to the roadway on February 12, 1954, as contrasted [26] to the sidewalk with reference to accumulated ice and snow, what was its condition?

A. I am sure that there was a considerable accumulation on it. However, they do have a snow removal program but it is generally a program to let it pack down a little before taking it off. I am sure that there was considerable snow on the street—that is packed snow, at the time. Ice, too. Because we had had a little warm spell. We had had

(Deposition of Hal Gilflen.)

a fire that morning and all the water was frozen on the street. I can state that the City Manager had phoned me prior to my going out to tell me they were going—to tell the Planning and Zoning Commission they were going to let the Seward Bakery open without doing extensive repairs because they had a fire that same day.

Q. Where is that located?

A. Directly across the street. The fire was that same morning. Mrs. L. V. Ray and Pat Williams watched the firemen fight the fire.

Q. Now, have we pretty well covered the doctors whom you have seen? Drs. McConville, Mr. Turnsen, the therapist; Mrs. Aylen, the therapist; Dr. Staff, Dr. Phillips and Dr. Hall?

A. That is correct.

Q. Did any of those doctors, other than Dr. Phillips or Dr. McConville take X-rays?

A. No, they were the only two.

Q. Do you have a list of your hospital bills? [27]

A. Not in its entirety. There were some which were not sent me. I do have Dr. McConville's office call account here, and I have a complete itemization of Ed Turnsen, the therapist. I also have a bill from the Seward Sanitarium and I have one from Dr. Phillips and Dr. Hall. Incidentally, on Dr. Staff's billing it would be through Dr. Hall, whose place he was taking while Dr. Hall was absent. I also have a complete list of the medications and the shots and the date given but not the quantities or amounts. That would all have to come from the doc-

(Deposition of Hal Gilflen.)

tors' reports. I have all the statements with me that I have received to date but there are some I still do not have.

Q. Other than the Seward Hospital, during the course of your convalescence, were you confined to any hospital other than that?

A. None. Although I understand they had made reservations for me on Friday on the second trip. Dr. McConville had a telephone conversation with Providence Hospital to have me hospitalized with the intent, according to his statement, that they were going to force the elbow. They were going to pull the shoulder socket and force the elbow into a straight position.

Q. Now, when prior to June, 1953, had you last followed the construction business or work?

A. About sixteen years.

Q. My question was when before the time you started working on your building, had you last worked or followed the construction or building trade? [28]

A. Oh—I built what is known as Gil's Cocktail Lounge in 1950.

Q. And prior to 1950?

A. My last construction prior to that I had been Superintendent at the Prince Rupert Port of Embarkation.

Q. What year would that be?

A. In 1944. That was when I left there. Just prior to that I had been yard foreman for the Puget Sound Bridge & Dredging Company. I was

(Deposition of Hal Gilflen.)

employed on the construction of Navy floating dry docks for the Navy Department under contract with the Puget Sound Bridge & Dredging Company. And prior to that I was with Simms on the Japonski Navy Base at Sitka and at the Sand Point Navy Supply Base. I was either Assistant Superintendent, building Superintendent or carpenter foreman. I didn't do too much in the way of using tools, only at Sitka. I did there at Sitka.

Q. Now, you have requested a \$7,166.10 judgment for medical and hospital expenses incurred and I requested you, by subpoena duces tecum, to bring in an itemization of those expenses. Do you have them?

A. I have them almost complete. Some will need explanation and some are not verified in the true sense. I did not keep a daily accounting each time I spent a dollar but I have the checks which were issued during the time I was there. Let me say that I know how much it cost me and I have the checks. I borrowed on my insurance policies and borrowed from my mother and borrowed from a friend. [29]

Q. Well, to shorten this up. Will you be willing to leave them with Mr. Atkinson and if necessary I can make copies or have copies made?

A. Yes, sir. You can have my complete file.

Q. Now, with reference to your claim of \$13,675.00 for wages paid to a substitute while you were prevented from running your business? Do you have an itemization or balance sheet on that?

A. Only to this extent. My wife had to learn the

(Deposition of Hal Gilfilen.)

trade because all our monies were used up in the care of this arm. And she quit nursing and went to bartending. We are full partners in the business and she took it on. A regular employee is paid \$25.00 a shift and that amount is predicated upon my being absent from my business for a year and a half. I just took the straight figure of \$25.00. In all cases I do not have the cancelled checks to prove I paid it to someone but I know it cost money because I wasn't there. It would take a good many itemizations.

Q. Where was your wife working at the time she quit?

A. She was not employed by anyone else. She was managing our affairs while I was busy on the construction. But she is not a bartender and she kept her registration up and was subject to call as a nurse in Seward.

Q. When was her last prior nursing job?

A. (Witness pauses.)

Mrs. Gilfilen: It was in December, 1951, I quit. Afterwards I did specializing around there for my friends and everything. [30]

Q. Did you bring with you your employment and tax records? A. Yes.

Q. Would you be willing to leave those with Mr. Atkinson?

A. I don't have 1955, but I have the quarterly records and I have all the rest of them.

Q. But you did bring copies of 1952, 1953 and

(Deposition of Hal Gilflen.)

1954, and I understand Mr. Jones is preparing 1955? A. Yes.

Q. You have no objection to those being left with Mr. Atkinson so that I may inspect them and if necessary make copies, and will you authorize Mr. Jones to discuss the 1955 returns?

A. Yes, I will write a letter.

Q. Did you bring any other documents or letters except the ones offered in evidence?

A. I have the cancelled checks and the airline ticket stubs and the expenses of the hotel.

Mr. Atkinson: Well, that would be a part and parcel of these other expenses.

Mrs. Gilflen: We have all our cancelled checks that we have written in 1954 and you can have the cancelled checks when Mr. Jones is through with them.

Q. So that we can obtain a background to obtain further information, you have no objection to being examined by a doctor here in Anchorage, do you, at a time suited to your convenience?

A. None whatever. It is agreeable. [31]

Q. Did you, at any time, consult a doctor in Anchorage with reference to your injury?

A. No, I did not.

Q. Will you explain why you went to Seattle instead of Anchorage?

A. I knew of no doctor who specialized in that work and I was advised by my doctor to go to a specialist and also by a very good friend of mine who is a doctor, Dr. Joe Sheldon, to hurry to a

(Deposition of Hal Gilflen.)

specialist because of the discoloration and the veins being so purple and distended. He feared then it would have to be amputated, although I had no idea it was so infected.

Q. You say Dr. Sheldon told you to go to a specialist? A. Yes.

Q. What did Dr. Phillips advise?

A. Well, Dr. Phillips was quite busy at that time and on the two or three occasions when he did get a chance to examine it and we discussed it he said he felt it was beyond him and he didn't know what to do next. It had got to that point then. I have learned since that was the smartest thing I ever did do. There was complete atrophy by the time I arrived in Seattle—it was gone.

Q. Is that the Dr. Sheldon who is presently practicing as an ENT man here in Anchorage?

A. Yes. However, that was not his field and he was just a very good friend of ours.

Q. You earlier mentioned Mr. Berne, Mr. Woods and Mr. O'Hara as [32] being witnesses to this accident or some portion thereof, and you have stated the names of all the doctors. Now, do you have the names of any other persons who might have relevant knowledge with the exception of your wife?

A. I was taken into my place of business before being put in his car by Ray O'Hara and he told my bartender, named Smith, that he was going to have to go to the hospital and for him to get in contact with my wife.

Q. Then other than Mr. Berne and Mr. Woods—

(Deposition of Hal Gilflen.)

they would be the only eye witnesses to this accident? A. Yes.

Q. If the names of any others come to your memory, would you make those available to Mr. Atkinson who can give them to me?

A. Yes, I would.

Q. I believe that is all I have, Ken. Oh, one further thing. I would like to have this diagram attached to the deposition. One further question. On the copy of this letter you did not put on the date "30 June, '54," did you?

A. I don't think I did.

Q. Then it is your present recollection you did not date it? Do you know who did or when it was put on?

A. Let me examine it, will you? It might be mine. I use the date that way when you work around military posts. No, it is not my writing.

Q. But with the exception of the writing, it is a copy of your [33] letter?

A. Yes, it is a true copy.

Mr. Atkinson: No cross-examination.

(Whereupon, at the hour of 3:30 p.m., on the 23rd day of February, 1956, the witness was excused.)

/s/ HAL GILFLEN.

United States of America,
Territory of Alaska—ss.

I, Gara H. Lyon, a Notary Public duly commissioned and qualified in and for the Territory of Alaska, do hereby certify that, pursuant to notice hereto attached and made a part hereof, there came before me on the 23rd day of February, 1956, at the hour of 2:00 p.m., at the office of Raymond E. Plummer, 225 Central Building, Anchorage, Alaska, the following named person—to wit: Hal Gilfilen, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and such testimony taken by me in shorthand and reduced to writing; that this deposition is a true record of such testimony.

I further certify that the deposition was then mailed to said deponent at Seward, Alaska, for reading and signing and was redelivered to me.

I further certify that I am neither attorney nor counsel for [34] nor related to or employed by, any of the parties to the action in which this deposition is taken, except as to employment for the purpose of taking this deposition in my capacity as Public Stenographer and Notary Public, and further than I am not a relative or employee, except as above stated, of any attorney or counsel employed by the parties or interested financially, or otherwise, in this action.

I further certify that the original of this deposition has been delivered by me to the Clerk of the

District Court, District of Alaska, Third Division,
Anchorage, Alaska, for filing in this cause, as re-
quired by law.

In Witness Whereof, I have hereto set my hand
and official seal this 14th day of March, 1956.

[Seal] /s/ GARA H. LYON,
Notary Public in and for the
Territory of Alaska.
My Commission Expires November 1, 1958.

Acknowledgment

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 9th day of March,
1956, before me, the undersigned, a Notary Public
in and for Alaska, personally appeared Hal Gilflen,
known to me and to me known to be the person
named in and who signed the foregoing deposition
and acknowledged to me that he signed the same
freely and voluntarily for the purposes therein set
forth.

Witness my hand and notarial seal hereto affixed
the day and year in this certificate first above
written.

[Seal] /s/ EARL M. GREGORY, JR.,
Notary Public in and for
Alaska.

My Commission Expires August 20, 1956.

[Endorsed]: Filed March 14, 1956. [35]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
BY DEFENDANT

The defendant, City of Seward, an Alaskan municipal corporation, through its attorney, Raymond E. Plummer, hereby moves the Court to enter summary judgment for the defendant in accordance with the provisions of Rule 56, Federal Rules of Civil Procedure, on the ground that the records, files, and depositions herein, and the affidavit attached hereto show:

1. That the City of Seward was under no legal obligation, with respect to the plaintiff, to remove natural accumulations of ice and snow from its sidewalks, and therefore the complaint fails to state any cause of action; and

2. That the plaintiff, as a matter of law, was guilty of contributory negligence and assumed the risk of whatever injuries he incurred, and is consequently precluded from any recovery; and therefore the defendant is entitled to summary judgment as a matter of law.

RAYMOND E. PLUMMER,

/s/ J. J. DELANEY, JR.,

Attorney for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed February 25, 1957.

[Title of District Court and Cause.]

STATEMENT OF GENUINE ISSUES

Plaintiff contends that the following are genuine issues necessary to be litigated, and which should preclude the granting of defendant's motion for summary judgment:

1. That whether or not plaintiff was contributorily negligent is a question of fact, not law, for the jury to decide, in view of all facts to be adduced at the trial of this matter.

2. That whether or not the snow and ice which had accumulated upon the sidewalk in question was a "natural" accumulation is a question of fact, not law.

3. That whether or not the plaintiff assumed the risk of injury when he walked upon the sidewalk in question is a question of fact.

McLAUGHLIN & ATKINSON,
Attorneys for Plaintiff.

By /s/ KENNETH R. ATKINSON.

Service of copy acknowledged.

[Endorsed]: Filed March 28, 1957.

[Title of District Court and Cause.]

No. A-11,718

AFFIDAVIT IN SUPPORT OF DEFEND-
ANT'S MOTION FOR SUMMARY JUDG-
MENT

United States of America,
Territory of Alaska—ss.

Raymond E. Plummer, being first duly sworn,
upon oath deposes and says:

That he is the attorney for the defendant, City of Seward, in the action herein; that this lawsuit was filed on December 16, 1955, by Hal Gilflen against said defendant, City of Seward; that in his complaint the plaintiff alleges that he slipped upon a sidewalk in the defendant city upon which "snow and ice had accumulated * * * to such an extent that travel over, across, and upon the same was insecure and unsafe for pedestrians and that said snow and ice was accumulated upon said sidewalk in an irregular shape; was packed and frozen, and so elevated, uneven, and ridged as to afford an insecure footing to those walking upon said sidewalk." (Paragraph IV of complaint.)

That on February 23, 1956, the plaintiff's deposition was taken before Gara Lyon, a qualified Notary Public, in the affiant's office, Room 220, Central Building, Anchorage, Alaska.

That during the course of his deposition the plaintiff, Hal Gilflen, stated in answer to questions put to him by affiant: that the condition of accumulated ice and snow on the sidewalk upon which he slipped was plainly visible (Page 8 of deposition); that during the thirty-day period immediately prior to the accident, he had walked past the place where he fell "most every day" (Page 6 of deposition); and that he knew of other persons in Seward who had fallen at the same point on the sidewalk because of the ice and snow thereon (Page 8 of deposition).

And the above referred to questions of the affiant and the answers and statements of the plaintiff, Hal Gilflen, in response thereto, are hereby incorporated in this affidavit as though fully set forth herein.

/s/ RAYMOND E. PLUMMER,
Attorney for Defendant.

Subscribed and Sworn to before me this 21st day of February, 1957.

/s/ JAMES J. DELANEY, JR.,
Notary Public for Alaska.

My commission expires: 8-27-60.

Service of copy acknowledged.

[Endorsed]: Filed February 25, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing upon defendant's motion for summary judgment, defendant being represented by Raymond E. Plummer, his attorney of record, and plaintiff being represented by McLaughlin & Atkinson, his attorneys of record, and the Court being fully advised in the premises,

The Court Doth Find:

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. That on February 12, 1954, the plaintiff slipped upon a sidewalk covered with ice and snow in the City of Seward, Alaska.

3. That the accumulation of ice and snow upon which the plaintiff slipped was a natural accumulation.

4. That the plaintiff slipped on the said sidewalk by reason of his own contributory negligence.

5. That the plaintiff knew the condition of the sidewalk, and voluntarily attempted to pass over it, and assumed the risk of any injuries incurred thereby.

Wherefore, the Court Doth Conclude:

1. That the City of Seward, defendant herein, was under no legal obligation, with respect to the

plaintiff, to remove natural accumulations of ice and snow from its sidewalks; and, therefore the complaint fails to state a claim for relief.

2. That, as a matter of law, the plaintiff was guilty of contributory negligence, and assumed the risk of whatever injuries he incurred; and is consequently precluded from any recovery.

3. That defendant is entitled to summary judgment as a matter of law.

Dated at Anchorage, Alaska, this 22nd day of August, 1957.

J. L. McCARREY, JR.

Service of copy acknowledged.

[Endorsed]: Filed August 22, 1957.

In the District Court for the District
of Alaska, Third Division

No. A-11,718

HAL GILFILEN, an Individual,

Plaintiff,

vs.

CITY OF SEWARD, an Alaskan Municipal Corporation,

Defendant.

JUDGMENT

This matter having come on for hearing on defendant's motion for summary judgment, defendant

being represented by Raymond E. Plummer, his attorney of record, and plaintiff being represented by McLaughlin & Atkinson, his attorneys of record, and the Court being fully advised in the premises, and Findings of Fact and Conclusions of Law having been heretofore entered herein, it is

Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same hereby is, granted, that the plaintiff have and recover nothing by his complaint, that the defendant, City of Seward, go hence without day, and that defendant recover its costs and charges in its behalf expended and have execution therefore.

Signed and ordered entered at Anchorage, Alaska, this 22nd day of August, 1957.

/s/ J. L. McCARREY, JR.,
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed and entered August 22, 1957.

In the District Court for the District of Alaska,
Third Division

Cause No. A-11,718

HAL GILFILEN,

Plaintiff,

vs.

CITY OF SEWARD, an Alaskan Municipal Corporation,

Defendant.

NOTICE OF APPEAL

Notice Is Hereby Given that Hal Gilflen, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 22, 1957.

McLAUGHLIN & ATKINSON,
Attorneys for Appellant,

By /s/ KENNETH R. ATKINSON.

[Endorsed]: Filed September 30, 1957.

[Title of District Court and Cause.]

STIPULATION

This stipulation made and entered into this 8th day of October, 1957, by and between the above named parties;

Witnesseth That

Whereas by a judgment entered in this action on August 22, 1957, the Court granted Summary Judgment for the defendant, and further ordered, adjudged and decreed that defendant recover its costs and charges in its behalf expended and have execution therefor;

And whereas, the Court thereafter, pursuant to defendant's motion, by a minute order entered September 6, 1957, allowed defendant as part of its costs an attorney's fee in the sum of \$300.00; and

Whereas the parties are in agreement that defendant's costs amount to \$51.25;

Now, Therefore, it is stipulated and agreed that the amended judgment affixed hereto shall be substituted for the judgment previously entered on August 22, 1957;

It is further stipulated that plaintiff may continue to prosecute his appeal from the judgment entered on August 22, 1957; or, at his option, and in the alternative, plaintiff may take a new appeal from the judgment as amended.

Dated at Anchorage, Alaska, this 8th day of October, 1957.

/s/ KENNETH R. ATKINSON,
Attorney for Plaintiff.

RAYMOND E. PLUMMER,
By /s/ JAMES J. DELANEY,
Attorney for Defendant.

[Endorsed]: Filed October 8, 1957.

[Title of District Court and Cause.]

AMENDED JUDGMENT

This matter having come on for hearing on defendant's Motion for Summary Judgment, defendant being represented by Raymond E. Plummer, his attorney of record, and plaintiff being represented by McLaughlin & Atkinson, his attorneys of record, and the Court being fully advised in the premises, and Findings of Fact and Conclusions of Law having been heretofore entered herein, it is

Ordered, Adjudged and Decreed that the defendant's Motion for Summary Judgment be, and the same hereby is, granted, that the plaintiff have and recover nothing by his complaint, that the defendant, City of Seward, go hence without day, and that defendant recover its costs and charges in its behalf expended in the amount of \$51.25, and attorney's

fees in the amount of \$300.000, and have execution therefore.

Signed and ordered entered at Anchorage, Alaska, this 9th day of October, 1957.

/s/ J. L. McCARREY, JR.,
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed and entered October 9, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Hal Gilflen, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on August 22, 1957, and from the amended judgment entered on the 9th day of October, 1957.

McLAUGHLIN & ATKINSON,
Attorneys for Appellant.

By /s/ KENNETH R. ATKINSON.

Service of copy acknowledged.

[Endorsed]: Filed October 22, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure and the stipulation designating record on appeal together with appellant's statement of points, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action or proceeding.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Judgment filed and entered in the above-entitled cause August 22, 1957, and from the Amended Judgment filed and entered in the above-entitled cause October 9, 1957.

Dated at Anchorage, Alaska, this 13th day of January, 1958.

/s/ WM. A. HILTON,
Clerk.

[Title of District Court and Cause.]

CLERK'S SUPPLEMENTAL CERTIFICATE

I, Wm. A. Hilton, Clerk of the District Court for the District of Alaska, Third Division, do hereby certify that the hereunto attached "Stipulation" and "Statement of Genuine Issues" are the Originals thereof as filed in my office dealing with the above-entitled action or proceeding.

The original papers hereto attached are to supplement and become a part of the original papers transmitted to the United States Court of Appeals, Ninth Circuit, San Francisco, California, on the 13th day of January, 1958.

Dated at Anchorage, Alaska, this 10th day of February, 1958.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 15854. United States Court of Appeals for the Ninth Circuit. Hal Gilflen, Appellant, vs. City of Seward, a Municipal Corporation, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed: January 16, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,854

HAL GILFILEN,

Appellant,

vs.

CITY OF SEWARD, a Municipal Corporation,

Appellee.

STATEMENT OF POINTS ON APPEAL

Appellant herein states that the points upon which Appellant intends to rely on this appeal are as follows:

1. The District Court erred in granting Defendant's motion for summary judgment and in entering a judgment and amended judgment for defendant thereon.

2. The District Court erred in finding as a matter of fact and ruling as a conclusion of law that the plaintiff was guilty of contributory negligence.

3. The District Court erred in finding as a matter of fact and ruling as a conclusion of law that plaintiff's alleged contributory negligence was the actual as well as the proximate cause of plaintiff's injury.

4. The District Court erred in finding as a matter of fact and ruling as a conclusion of law

that the plaintiff in lawfully passing over and across a sidewalk of and within the defendant City assumed the risk of any injuries incurred thereby.

5. The District Court erred in adopting and thereby finding as a matter of law that the hazardous condition of defendant's sidewalk which caused plaintiff's injury was due to a "natural accumulation" of snow and ice.

6. The District Court erred in failing and refusing to submit the above-referred-to genuine issues of fact to the determination of a jury, as demanded by plaintiff.

McLAUGHLIN & ATKINSON,
and
BOYKO, TALBOT & TULIN.

By /s/ EDGAR PAUL BOYKO,
Of Counsel for Appellant.

[Endorsed]: Filed February 10, 1958.

[Title of District Court and Cause.]

STIPULATION

To the Clerk of Said Court:

The parties hereby stipulate and agree that the statement of genuine issues filed by plaintiff in the District Court, in opposition to defendant's motion

for summary judgment therein, be designated and included in the record on appeal, together with this stipulation, and that the same be in addition to the designation contained in the stipulation, dated the 22nd day of November, 1957.

/s/ RAYMOND E. PLUMMER,
Of Counsel for Appellee.

/s/ KENNETH R. ATKINSON,
Attorneys for Appellant.

[Endorsed]: Filed February 11, 1958.

IN THE
**United States Court of Appeals
for the Ninth Circuit**

**WM. T. ALVARADO SALES CO. and
SPEE-DEE CHECKOUT SYSTEMS, INC.,**

Appellants,

vs.

**SIDNEY S. RUBALOFF and ABRAHAM M. GROSS,
individually and doing business as
CHECK-A-MATIC CO.,**

Appellees

**WM. T. ALVARADO SALES CO. and
SPEE-DEE CHECKOUT SYSTEMS, INC.,**

Appellants,

vs.

DU-MORE FIXTURE CO., INC.,

Appellee

BRIEF FOR PLAINTIFF-APPELLANTS

EARL & WEBB,

Attorneys for Plaintiff-Appellants,

344 South Park Street,

Kalamazoo, Michigan.

**FRED H. MILLER,
HAZARD & MILLER,
Of Counsel.**

FILED

JUN 24 1958

INDEX

	Page
Table of Cases Cited.....	iii
Index of Exhibits.....	Volume II of record
Table of Exhibits Offered and Received.....	Appendix I
Graphic Application of Claims to Accused Devices..	Appendix II
Statement of Jurisdiction.....	1
Statement of Case.....	3
Specification of Errors.....	4
Argument of the Case:	
Summary	6
The Patented Structure.....	8
Mode of Operation.....	11
Novel Interrelation and Coaction of Parts.....	13
Structure of the Patent in Suit Is Commercially Successful	14
Prior Art	15
Turnham	16
Bradley	17
Muse	18
Price	19
Goodrich	20
Florence	20
Novelty Acknowledged	21
Combination Unsuggested	23
Improved Results Achieved by Patent in Suit..	24
Accused Devices	26

	Page
Check-A-Matic C-2 and C-3.....	27
Check-A-Matic FD-5	28
Mode of Operation.....	30
Defendant Du-More's Structure.....	31
All Accused Devices Infringed.....	32
Analysis	33
Novel Coaction	36
Utility and Acceptance.....	37
No Prior Art Anticipation.....	38
Invention Was Completely Adopted by De- fendant Appellees (i. e. Infringement)...	39
Du-More Infringement	40
Check-A-Matic Infringement	41
Conclusion	42
Added Admission from Record.....	Appendix XVI

TABLE OF CASES

A. & P. v. Supermarket, 340 U. S. 147.....	6, 34
Baker-Cammack v. Davis, 181 Fed. 2d 550.....	34
Bisley, In re, 197 Fed. 2d 355.....	39
Coleman v. Holly Manufacturing Co., 233 Fed. 2d 71	37, 38, 42
Florence-Mayo Nuway v. Hardy, 168 Fed. 2d 778....	39
Gomez v. Grant, 177 Fed. 2d 266.....	38
Graver Tank Co. v. Linde, 339 U. S. 605.....	42
Guide v. Desperak, 249 Fed. 2d 145.....	42
Jacuzzi Bros. v. Berkley Pump, 90 Fed. Supp. 238..	8
Muench-Kreuzer Candle Co. v. Wilson, 246 Fed. 2d 624, headnote 9.....	3, 34, 42

	Page
Patterson-Ballagh v. Moss, 201 Fed. 2d 403.....	6, 15, 34
Sinclair & Carroll Co. v. Interchemical Corp., 325 U. S. 327.....	34
Western States Machine Co. v. S. S. Hepworth, 147 Fed. 2d 345.....	8

STATUTES

Title 28 U. S. C., Sections 1338 and 1400 (b).....	2
Title 35 U. S. C., Section 282.....	5

PUBLICATIONS

Report of Commissioner of Patents to Senate, 1850..	33, 35
---	--------

INDEX TO APPENDIX TO BRIEF

Table of Exhibits.....	I
Application of claims to accused Devices	
Claim 3 applied to Check-A-Matic C2, C3.....	II
5 “ “ 	III
6 “ “ 	IV
7 “ “ 	V
Claim 3 applied to Check-A-Matic FD-5.....	VI
5 “ “ 	VII
6 “ “ 	VIII
7 “ “ 	IX
Claim 3 applied to Du-More.....	X
5 “ “ 	XI
6 “ “ 	XII
7 “ “ 	XIII
Title page Commissioner's Report.....	XIV
Page 419 Commissioner's Report.....	XV
Added Admission from Record.....	XVI

IN THE

United States Court of Appeals for the Ninth Circuit

No. 15,855

WM. T. ALVARADO SALES CO. and
SPEE-DEE CHECKOUT SYSTEMS, INC.,

Appellants,

vs.

SIDNEY S. RUBALOFF and ABRAHAM M. GROSS,
individually and doing business as
CHECK-A-MATIC CO.,

Appellees

WM. T. ALVARADO SALES CO. and
SPEE-DEE CHECKOUT SYSTEMS, INC.,

Appellants,

vs.

DU-MORE FIXTURE CO., INC.,

Appellee

BRIEF FOR PLAINTIFF-APPELLANTS

STATEMENT OF JURISDICTION

This appeal is taken from the judgments of the United States District Court, Southern District of California, Central Division in two cases consolidated for trial by the District Court.

The complaint in Civil Action No. 18,910 (R. pg. 3) alleges that William T. Alvarado Sales Co. and Spee-Dee Checkout Systems, Inc., are, respectively, exclusive licensee in the State of California, and owner of United States Patent No. 2,599,909 issued June 10, 1952 to the predecessor of Spee-Dee Checkout Systems, Inc., as assignee of the inventor Will L. George. The complaint alleges acts of infringement in the judicial district of the Court by Sidney S. Rubaloff and Abraham M. Gross individually and as partners doing business as Check-A-Matic, and residence of defendants in the judicial district of the Court. Injunctive and other relief is sought under the provisions of Title 28 U. S. C., Sections 1338 and 1400 (b).

By answers filed (R. pg. 6) Sidney S. Rubaloff and Abraham M. Gross admits their residence and the jurisdiction of the District Court and the issuance of the patent in suit but deny infringement and validity of the patent. Note: Separate answers were filed by Sidney S. Rubaloff and Abraham M. Gross but they are identical and only one is reproduced in the printed record.

The amended complaint in Civil Action No. 19618 (R. pg. 14) alleges the same complaint by the same parties plaintiff against Du-More Fixture Co., Inc. and requests the same relief under the same statutes.

By answer filed (R. pg. 17) the defendant Du-More Fixture Co., Inc. admits its residence and the jurisdiction of the Court and the issuance of the patent but denies infringement and validity of the patent. A counterclaim seeking declaratory judgment of invalidity of the George patent in suit was interposed by the party Du-More Fixture Co., Inc. and issue on the counter-claim was joined.

The claims charged to be infringed in both cases are claims 3, 5, 6 and 7 of the George patent No. 2,599,909.

STATEMENT OF THE CASE

These cases raise the traditional issues of a patent infringement case. Issues of ownership of the patent and jurisdiction of the District Court have been resolved. Manufacture and sale of the accused devices have been admitted and the sole remaining issues are the validity of the patent in suit and the infringing character of the accused devices.

The District Court, in a five line minute order, (R. pg. 25) rendered judgment for defendants, appellees, and rendered the opinion here quoted *in toto*:

“The Court is of the opinion that the patent in suit is invalid because of prior art and that the claims of the patent are not invention.”

Under the local rules of the District Court defendant appellees submitted formal findings of fact, conclusions of law and judgments (R. pgs. 26 and 31) and these were adopted by the District Court and the judgments entered on December 10, 1957.

These judgments raise the questions of improper application of recognized rules and tests, legal and factual, of the validity of the patent in suit. As will be pointed out, the facts disclosed by the record not only do not support the finding of invalidity of the George patent in suit but affirmatively require findings of validity and infringement and appropriate judgments thereon. The factual evidence of the physical structures and modes of operation of the patented device and the accused devices is complete and not seriously controverted in any respect. In situations of this kind, this Court has found it proper to decide the question of infringement *Muench-Kreuzer Candle Co. v. Wilson*, 246 F. 2d 624, headnote 9.

SPECIFICATION OF ERRORS

1. The trial Court failed to recognize and take into account the *admitted* novelty of the patented device.
2. The trial Court failed to recognize and take into account the *admitted* insufficiency of the prior art to teach or suggest the combination of elements in the patented device.
3. The trial Court failed to recognize and take into account the *uncontroverted* evidence of novel coaction between the elements of the patented device.
4. The trial court failed to recognize and take into account the *admitted* utility and improved action of the patented device.
5. The trial Court failed to recognize and take into account the fact that the overall result or function of the patented device is more than the sum of the functions of its several parts, considered separately.
6. The trial Court failed to recognize and take into account the *admitted* fact that the accused devices utilize the same concept of operation as the patented device for the same purpose as the patented device.
7. The trial Court failed to recognize and take into account the *admitted* fact that the prior art cited by appellees against the patent in suit did not show anything new or different from the prior art considered by the Patent Office before allowing the patent.
8. The trial Court failed to recognize and take into account the fact that the accused devices each included all of the elements defined by one or more claims of the patent in suit.

9. The trial Court failed to recognize and consider the *uncontroverted* evidence of commercial success of the patent in suit and the tribute paid the invention by defendant appellees in copying the device of the patent.

10. The trial Court failed to consider that the patent in suit is presumed to be valid. U. S. C., Title 35, Sec. 282.

11. The trial Court failed to consider that the problem solved by the patent in suit had long been recognized by trade and that in spite of this no one prior to the patentee had been able to conceive or devise the simple solution thereof as disclosed by the patentee.

12. With reference to the findings of fact, conclusions of law and judgment in CA No. 18,910-HW, Check-A-Matic:

A. There is no evidence to support finding 7 (R. pg. 28) that each and every one of the individual components of the claimed invention and of the claims thereof were all well known in the prior art prior to the application for the patent in suit.

B. There is no evidence to support finding 8 (R. pg. 28) that each claim is a non-patentable aggregation, makes no improvement in the art and provides no function or interaction of parts or novel and unexpected consequences.

C. There is no evidence to support finding 9 (R. pg. 29) that the functions of the various components of the disclosed invention are no different from the functions of the same components in the prior art and that there is no new relationship and coaction between the components.

D. There is no evidence to support finding 10 (R. pg. 29) that the difference between the invention and the prior art was obvious at the time of the invention to persons having ordinary skill in the art.

E. The above findings of fact being in error, conclusions of law 2 and 3 (R. pg. 30) are unsupported and in error and the judgment entered thereon is in error.

13. With reference to the findings of fact, conclusions of law, and judgment in C. A. No. 19618-HW, Du-More; findings of fact 7, 8, 9 and 10, (R. pg. 32) and conclusions of law 2 and 3 being identical in substance to the same findings in CA No. 18910-HW are in error for the same reasons pointed out in paragraph 12 above and the judgment entered thereon is in error.

ARGUMENT OF THE CASE

Summary

This appeal involves the validity of the George patent in suit. The evidentiary facts are not seriously in dispute and the question of infringement should also be considered to determine the scope of the patent and prevent undue delay in settling the rights of the parties and the public with respect thereto. At least, the degree and extent to which defendant appellees copied appellants' structure and utilized the essential concepts of the patent in suit must be considered as indicating appellees' opinion of the utility and desirability of the structure of the patent. *Patterson-Ballagh v. Moss*, 201 F. 2d 403.

The patent in suit is on a checkstand for self service stores such as "supermarkets". The patent relates to the art considered in *A & P v. Supermarket*, 340 U. S. 147, and this case is recognized as pertinent. It also makes it a matter of judicial record that the problem solved by the patentee had existed long prior to application for the patent in suit.

The argument first points out the structure and mode of operation of the patent in suit. The claims in suit are analyzed to point out the scope and definition of the invention. The novel interrelation and coaction of the parts in advancing the articles of a customer's grocery purchase transversely of the counter, always to the same position closely alongside of a cash register supported over a sector of a rotatable receiving table is then pointed out. The pertinent features of the prior art are explained and reference made to points in the record where it is admitted that the prior art does not suggest the combination of the patented structure or disclose its novel features. The advantages and improved results achieved by the patented structure in bringing all the articles of a grocery purchase into the same position within easy reach and clear view of the store checker are then elaborated. Additional resulting advantages of greater checking accuracy in preventing the theft or missing of individual articles and greater convenience to the retail customer are elaborated. The structures and modes of operation of the accused devices are described and compared with the claims and structure of the patent in suit to show how the accused devices support a cash register over a sector of a rotatable receiving table and alongside of a stop across the table so that articles are advanced transversely with respect to the checkstand always to the same position for ease in checking and removal to a discharge counter in the same way as in the patented structure. The legal implications of the evidentiary facts are analyzed, with authorities, to point out wherein all of the factors such as novelty, utility, new coaction of parts and lack of anticipation commonly recognized as supporting a finding of validity and infringement are present in this case. The argument concludes with a statement of the facts and conclusions as they should have been found by the Trial Court.

The Patented Structure

The structure of the patent in suit is not complex. Sheet 1 of the drawings of the patent is reproduced on the opposite page for convenience and using *claim 6* of the patent as a pattern the structure comprises:

- (a) A rotatable receiving table, 6,
- (b) a stationary guard rail (unnumbered) for a substantial portion of the rim of said receiving table,
- (c) a discharge counter, 5, disposed in the plane of said receiving table and having a portion thereof conformed to a segment of the table so that articles may be slid from the receiving table to the discharge counter,
- (d) means (27, 28, 29) forming a stop for articles on the receiving table and a register support disposed above the plane of said receiving table at the side of said stop,
- (e) and means (a motor concealed within the base of the stand) for rotating said receiving table. (The switch 24 controls the motor)

A comparison of the above quoted claim 6 with the other claims charged to be infringed points out the scope of the invention as allowed by the Patent Office. The claims should be compared in interpreting their meaning. *Jacuzzi Bros. v. Berkley Pump*, Dist. C. N. D. Cal. 90 Fed. Supp. 238; and *Western States Machine Co. v. S. S. Hepworth*, (C. A. 2) 147 F. 2d 345:

Claim 3 calls for:

- (a) A checking stand for a grocery store and the like comprising a register support panel (28) having a stop portion 29 along one edge thereof,

June 10, 1952

W. L. GEORGE

2,599,909

CHECK STAND FOR GROCERY STORES AND THE LIKE

Filed Sept. 15, 1947

2 SHEETS—SHEET 1

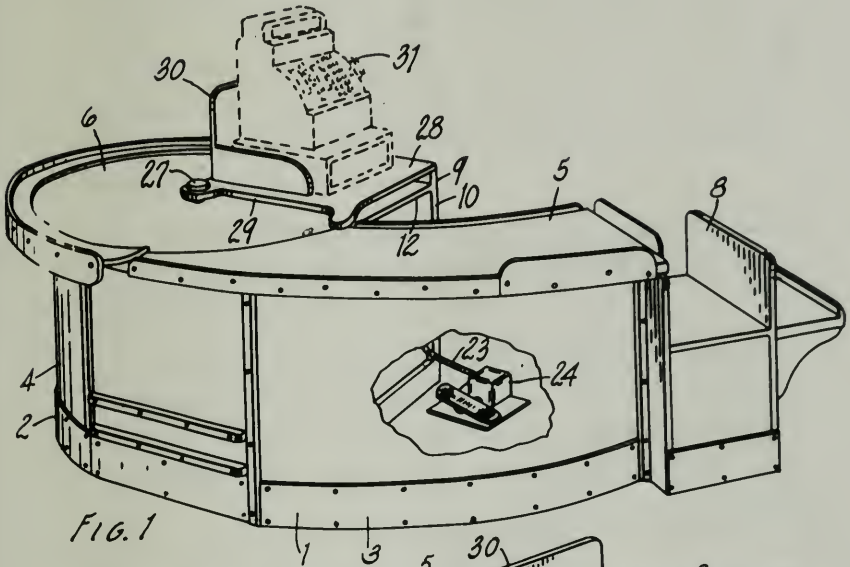


FIG. 1

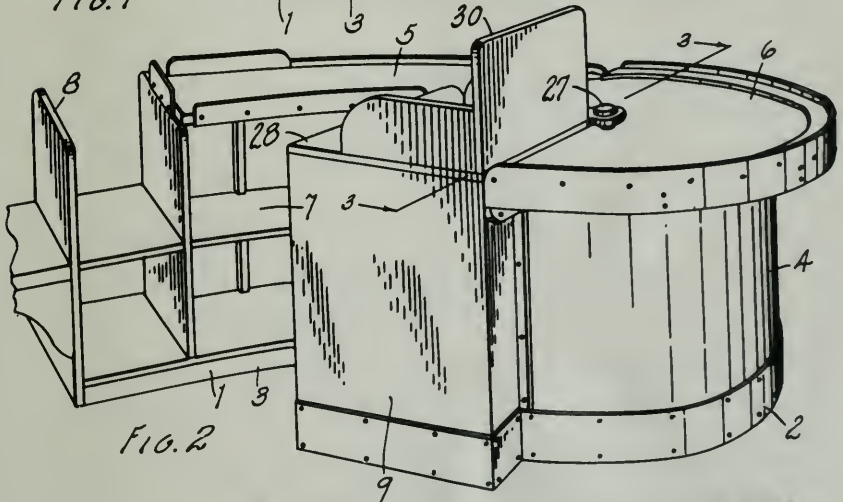


FIG. 2

INVENTOR
William L. George
BY

O. L. Lark
Attorney.

(b) a turntable (6) mounted to rotate partially underneath said panel whereby articles placed on said turntable will be carried thereby against said stop portion (29),

(c) a discharge counter (5) extending from said turntable (6) adjacent to said support panel (28),

(d) the end of said discharge counter extending from said stop portion (29) accurately away therefrom for a substantial distance along the periphery of said turntable (6),

(e) said discharge counter extending longitudinally from said end (d. above) with its inner edge concavely arcuate with respect to said support panel,

(f) a guard ring (unnumbered) around the exposed edge of said turntable and extending inwardly over the outer edge of said discharge counter (5) to direct items on said table (6) toward said stop portion (29).

(g) a motor (21, Fig. 3) for rotating said turntable (6),

(h) and means (24) for controlling said motor located behind said discharge counter (5) for operation by the operator of said stand.

Claim 5 calls for:

(a) A checking stand for self-service stores comprising a base (1-4),

(b) a turntable (6) rotatably mounted above part of said base,

(c) a discharge counter (5) supported above the remainder of said base and extending as a continua-

tion from a portion of the periphery of said turntable (6),

(d) a register support panel (28) supported above a quadrant of said turntable (6) adjacent to said counter (5) whereby said turntable (6) will rotate freely in closely spaced relation underneath said support panel (28),

(e) a motor (21) for rotating said turntable (6),

(f) and a switch (24) for regulating said motor (21).

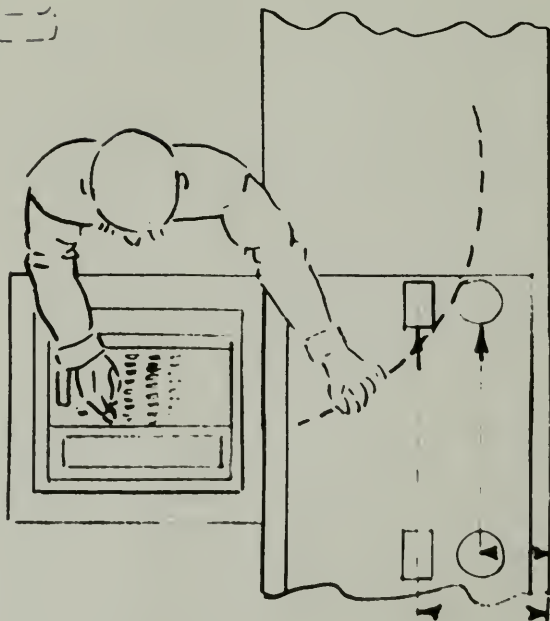
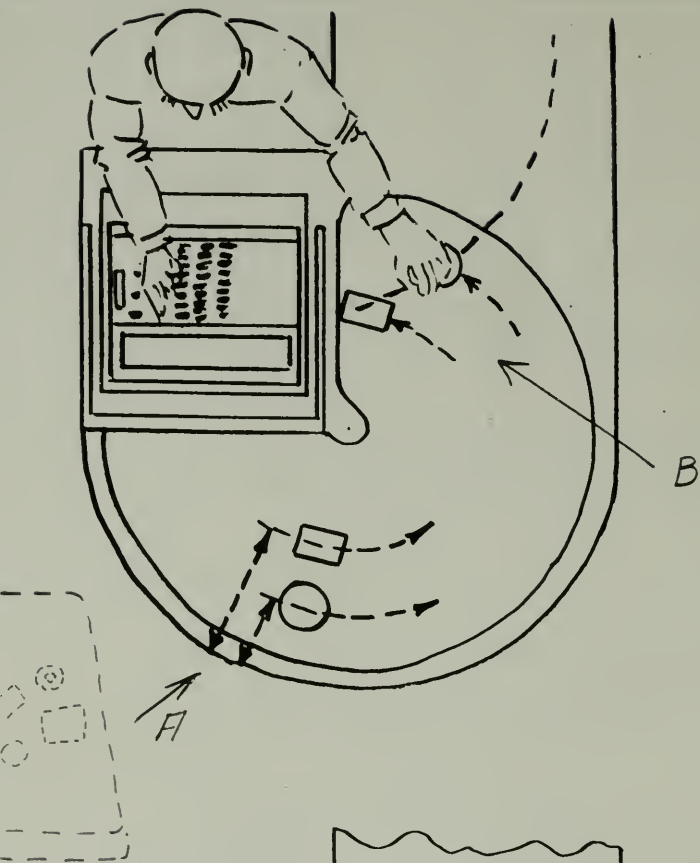
Claim 7 calls for:

(a) A checking stand for self-service stores comprising, an item receiving counter (6) of generally circular outline mounted to rotate in the plane of its surface,

(b) a register support (28) positioned in closely spaced relation over a sector of said receiving counter (6) and having a side edge (29) extending generally radially of said receiving counter (6) to the periphery thereof to form an article stop for articles rotated thereagainst by said receiving counter (6),

(c) and a discharge counter (5) extending as a generally co-planar extension of said receiving counter (6) from another sector of said receiving counter (6) adjacent said stop (29).

The discharge counter may be curved as shown in the reproduced portion of the patent or it may be straight as shown in Fig. 4 of the patent (Pl. Ex. 3, R. pg. 251). Claims 5, 6 and 7 do not require the curve. The stop 29 for articles on the receiving table may be recessed into the panel 28 as shown and as required in claim 4 of the patent or it may extend across the rotatable receiving table in other



less specifically defined manners as set out in claims 3, 5, 6 and 7 above. The register support panel or means 28 may be located over the turntable as in claims 3, 5 and 7 or merely located above the plane of the receiving table as in claim 6 and be adapted to support a cash register as indicated at 31 over a sector of the receiving table and alongside of the stop. The stop portion 29 may be part of the register support panel 28 as defined in claims 3 and 7 or it may be a separate means as defined in claim 6, or it may be a separate part as the omission of any limitation from claim 5 indicates.

Mode of Operation

The structure of the patent in suit is designed for use in self service stores of which combined grocery stores and meat markets commonly referred to as "super-markets" are the most familiar example. The structure of the patent is known in the trade as a checkstand and as stated as the first object in the patent its object is:

"to provide a stand for checking out the items of a customer's purchase in a grocery store or the like which will *speed up the operation* of checking each item and *reduce the possibility of error* in missing items or checking a single item twice." (Emphasis added.)

The portion of plaintiffs' Exhibit 9 reproduced on the opposite page (with explanatory notes added) clearly discloses the mode of operation and the physical action of the patented structure. Note that defendant appellees' expert acknowledged the accuracy of the original exhibit at R. pgs. 216-217. The checkstand attendant, known in the trade as a checker, stands in the corner formed by the cash register and the discharge counter in facing relation

to the cash register and what may be termed the front of the checkstand. The customer approaches the front of the checkstand and the rotatable receiving table with his or her cart of groceries and commences to place the articles of the purchase on the receiving table as indicated at A. These articles may be hidden from the checker's sight by the cash register but on seeing the customer, the checker starts the receiving table rotating, if it has not been left in rotation, in a counter-clockwise direction and this advances the articles to the position indicated at B, closely alongside the cash register. This, incidentally, makes room for additional articles of the purchase in front of the customer.

The actual operation of the checkstand varies with the preference of the checker and the amount or number of items being presented for checking. (R. pgs. 55 to 58 and the confirmation by appellees' expert at page 198.) Individual articles may be manually intercepted while moving, or the rotation of the receiving table may be stopped with the article near the side of the stop. In case the table is left rotating any article left on the table is intercepted by the stop alongside of the cash register and prevented from continued rotation. In any and each of these instances the articles are presented closely alongside the cash register in full view and easy reach of the checker for easy visual pricing and manual removal by the checker to the discharge counter. The checker operates the cash register with the right hand to record the price of each item while removing the item to the adjacent discharge counter with the left hand. *Each and every article comes around to the same line closely alongside of the cash register. The checker can depend on this and does not have to continually scan the remainder of the receiving table.*

Novel Interrelation and Coaction of Parts of the Checkstand

The rotatable receiving table performs the functions of receiving and supporting the articles of a customer's purchase at a point remote from the checker and any preceding customer who may be paying her bill to the checker. It advances the articles always to the same convenient checking position and travels under the cash register to the front of the stand to receive additional articles.

The register support panel not only supports the cash register but supports it in the novel and particularly advantageous position shown over a sector of the receiving table where the side of the register is closely adjacent the article stop and where the rear edge of the cash register is close to the rearmost part of the receiving table so that the checker can advance and stand closely adjacent the receiving table and within easy arm's reach of articles advanced to the stop by the rotating table. The left side edge of the register support panel (as viewed by the checker) may perform the additional, and novel, function of acting as the stop for the articles of the purchase but this is not required by all claims of the patent in suit. A separate bar or stop could obviously be mounted across the receiving table closely alongside of the cash register and the side of the register support panel. (See claim 6 quoted on page 8 above in which the "means" in clause (e) may be plural means separately forming the cash register support and stop.)

The discharge counter performs the function of receiving articles advanced thereto or thereacross by the checker and coacts with the receiving table by being conformed at its forward end to the shape of the circular receiving table.

The discharge counter coacts in a novel manner with the register support panel by being positioned closely adjacent the rear corner of the register support panel so that the front of the discharge counter is within the normal swinging arm's reach of the checker while moving checked items rearwardly, and so that there is a continuous supporting surface for articles from alongside the article stop to the discharge counter. The articles can be merely pushed or swept from the checking position to the discharge counter.

The means forming the stop extending across the receiving table coacts novelly with all three of the receiving table, the register support panel and the discharge counter elements in that its position is such as to interrupt the rotary advancing motion of the articles of purchase closely alongside the cash register and immediately adjacent the discharge counter. As previously noted, this interruption at the checking position is always at the same location. When located near or against the stop, all the articles are in easy view and reach for checking and removal to the discharge counter, and further all articles of a purchase placed on the receiving table are advanced automatically to this convenient checking position. There is no chance of an article being missed or conveyed past the checker without its being checked.

Structure of the Patent in Suit is Commercially Successful

While no great issue was made of the point, the Court should note at R. pg. 77 that over 1200 of one model of the checkstand were made by plaintiff appellants. Appellants' Exhibits 19, 20, 25, 26 and 31 (R. pgs. 278 to 297 and 299) indicate a fine record of commercial success of the patented structure. Appellees cannot deny the utility of the pat-

ent in view of their advertising of all its desirable features. (See appellants' Exhibits 13 and 31, R. pgs. 270 and 298) *Patterson-Ballagh v. Moss*, F. 2d 403.

Prior Art

All inventions are tested as to their patentability by a comparison of the structure of the patent with the prior art existing at the time of filing of the patent in suit. In this case the appellees cited a number of patents in their answers but only the following patents were relied on.

Turnham	2,242,408
Bradley	2,317,438
Muse	2,237,080
Price	2,268,897
Goodrich	1,071,004
Florence	1,400,948

The patent to Wilcox, 1,664,055 was mentioned but at R. pg. 154 this was acknowledged by defendants' expert to be irrelevant. The Trench patent 756,298 was mentioned but at R. pg. 174 defendants' expert designated the Turnham, Bradley and Muse patents as being as good as any showing the combination. For the appellant, Check-A-Matic, this same expert discussed only the Turnham, Bradley and Price patents.

So far as this case is concerned the pertinent features and the presence, or absence, of relevant elements of the prior art patents are believed to be as follows:

Turnham 2,242,408 (R. pg. 416)

This patent discloses a check stand for self-service stores and is thus related to the same art as the George patent in suit. Turnham discloses an elongated counter top 3 supported upon a suitable base 2. A stand for supporting a cash register 6 is positioned behind the counter intermediate of the ends thereof *with the cash register and its stand completely off of the counter 3*. The left or front end of the counter to which the customer brings her purchases is extended beyond the cash register 6 and a U-shaped framework 20 is slidably supported on the left extension and central portion of the counter by side bars 26 and 27.

The disclosed theory of operation of the Turnham check stand was for the customer to place the articles of a purchase within the U-shaped frame 20 on the left end extension 15 of the counter after which the checker would draw the U-shaped frame and the articles rearwardly to along side of the cash register. The U-shaped frame was then returned to the end of the extension leaving an open counter space for a succeeding customer to unload her purchase while the first customer was having the articles of her purchase check out. The several articles of the purchase were deposited in *an irregular mass completely across the width* of the counter 3.

The Turnham patent shows *rectilinear motion of the articles of a purchase longitudinally along the counter* with a checking position of rest for the articles located completely across the width of the counter along side of the cash register. The motion of articles of a purchase was necessarily intermittent and there was *no provision for moving articles transversely of the counter and toward the side of the cash register* or the cash register stand. There

was no common or uniform checking spot or line which the checker could rely on. He had to continually scan the whole checking area on the counter and reach to different locations thereon.

Bradley 2,317,438 (R. pg. 404)

This patent discloses several mechanized forms of the Turnham check stand. The elongated counter 9 with *the cash register support stand 21 located completely off of and to the rear thereof* remains the same as the Turnham check stand. One form of the Bradley patent provides guide rails 31 along the sides of the counter and its forward extension as in Turnham but instead of a U-shaped pull frame for transferring the articles of a purchase, the counter supports a low flat carriage 33 mounted on wheels 34. Other forms of the Bradley patent shown in Figs. 7 and 10 disclose rollers 58 in the counter surface or a continuous belt 81 on the counter for advancing the articles of a purchase to the checking position along side of the cash register. In all forms of the Bradley patent *the motion of the articles of a customer's purchase remain rectilinear in a straight line along the length of the counter and there is no structure or attempt to move the articles transversely to closely along side of the cash register.* Articles placed near the front or outer side of the counter where the customer stands and unloads her shopping cart will remain on the outer edge of the counter in a position furthest removed from the position of the checker behind the cash register. As in Turnham, the checker had no assured common checking point to which all articles were advanced. He still had to scan the whole counter and reach to its furthest edge.

Muse 2,237,080 (R. pg. 387)

This patent discloses an elongated counter 13 with a *cash register support stand 21 positioned at the rear side of and completely off of the counter* and intermediate of the ends thereof. A continuous conveyor belt 7 extends from the front end of the counter well past the checking position at the cash register stand. The principle difference between the Muse and Bradley structures is that Muse provides a packing recess toward the rear or right end of his counter at the end of the belt 7 so that the belt can direct and discharge articles directly into a packing bag or box positioned in the recess indicated at 17.

So far as movement of the articles of a purchase from the customer unloading position in front of the cash register to the checking position along side of the cash register is concerned *the Muse check stand functions in the same manner as the Bradley and Turnham patents*. Muse is distinguishable from Bradley in that the belt conveyor is capable of carrying articles on past the cash register and checking position and does not necessarily bring the articles to a halt. Thus if the movement of the Muse conveyor belt is not properly regulated, articles may be carried past the checker without being checked. *The movement of the articles on the Muse check stand is still rectilinear in a straight line past the side of the cash register and there is no attempt or structure provided to cause the articles to move transversely toward the side of the cash register.*

Price 2,268,897 (R. pg. 391)

This patent discloses part of *an industrial packaging machine* designed to erect paper milk bottles from an irregular mass of the bottles and transfer them in erected position to a packaging or other processing mechanism. For this purpose the Price machine is provided with a large hopper 25 that obstructs approach to the front or side of the bottle advancing turn table 50. Other parts of the erected mechanism such as the gears 40 appearing in Fig. 1 of the patent obstructs approach to another side of the turntable. After being erected and advanced onto the turntable through the inlet throat and guide rails 57 the bottles are translated 270° in a continuous counter clockwise motion until they strike a curved deflection bar 59 extending across the turntable. This deflector bar 59 constantly directs the milk bottles to a discharge throat at the periphery of the turntable.

Not only is the function of the Price machine entirely foreign to check stands for supermarkets but the construction of the Price machine prevents any attempt to utilize the turntable 50 as a part of a check stand. No cash register or checking device is shown or needed by Price and no structure is provided for supporting such a cash register, if there were one, over the sector of the turntable along side of the deflector bar 59. Even if a cash register were so provided the obstructing hopper 25 and the narrow discharge throat 58 would render the device unfit for operation as a checkstand.

Goodrich 1,071,004 (R. pg. 334)

This patent discloses a packing table arranged to facilitate the packing of pieces of goods such as chocolates in containers. The table is thus employed for a use foreign to the checking of a grocery purchase. A fixed circular annular packing platform 3 provides packing space for a plurality of persons standing around the table. A rotating center portion 3A of the table is adapted to support and rotate boxes or bins of different styles or flavors of chocolates successively past the several packers so that each packer selects chocolates from successive supply boxes to form or assemble an assortment of chocolates in sales boxes.

No numerical checking or pricing of individual articles is required and no support is provided for holding a cash register over any part of the center rotating table 3A. In fact the provision of such a support would defeat the designed purpose of the turntable 3A as all supply boxes would then be stopped and would accumulate alongside of the cash register instead of continuing to rotate to help the packing function of the packers as mentioned by Goodrich.

Florence 1,400,948 (R. pg. 352)

This patent discloses a merchandising arrangement for stores and includes a rotating display device 16 with a plurality of tiered annular shelves 17. The circular shelves are positioned in an opening in a wall 3 of the store so that the shelves rotate through a rear storeroom where the shelves can be loaded and then advance past an arcuate fence where customers may stand to pick up any item which they may desire as it comes past. No attempt is made to check or regulate what the customer takes off of the rotating shelves and the customer brings and pays for the

selected articles at a *remote checkout counter 35*. No cash register or other checking device projects over any of the shelves 17 and indeed such a checking device would defeat the purpose of the Florence tables 17 as it would sweep all articles off of the table as they were advanced to the side of such a checking device. It would serve no useful purpose to position a checking device over one shelf for utilization in connection with other shelves because the display area of the one shelf over which the checking device was positioned would then become useless and reduce the capacity of the turntable as a whole. The operation of the Florence device is exactly opposite to the patented device. The customers take articles off the Florence device and carry them away instead of bringing them to the turntable and letting the turntable take the articles to the checker as in the device of the patent in suit.

Novelty Acknowledged

Defendant appellees' expert repeatedly acknowledged and recognized the novelty and distinctive action of the patented checkstand in bringing articles *transversely* to the side of the cash register rather than moving the articles *longitudinally past* the side of the cash register. At R. pg. 167 it is stated:

“Q. Is there any disclosure in any of the prior art patents which you have referred to heretofore that discloses a checkout counter in which articles are carried arcuately around a turntable and against the side of a register support panel?

A. I would have to review all of the art but to *the best of my recollection there is no showing of that. * * *.*”

and at R. pg. 170:

“Q. Mr. Sellers, do you recognize any advantage that might be achieved by causing the articles of a purchase to advance against the side of a cash register rather than longitudinally along and past the side?

A. Well, whether it be an advantage or not, if it advanced into the side and against the side of the cash register it would be stopped. *In the other instance, it would not be stopped.* Whether that would be an advantage or not is a question.”

and at R. pg. 173:

“A. Well, I think the art produced is the best evidence of that, but the primary distinction lies in the fact that the prior art did not include a rotatable turntable embodied in a stand per se. * * *

Q. I believe you have answered this in a round-about way, Mr. Sellers, but would you state whether or not you can point to a single patent cited against the George patent that shows the combination claimed?

A. No. I think I have already answered that and stated that there is in the prior art a number of tables which were adopted to be incorporated there, but to the best of my recollection there is no one patent that actually shows it so positioned.”

See also the admissions by counsel in response to the question of the Court at R. pg. 240. “There can be no question but that the patent in suit is the first to teach the use of a rotatable turntable in a checkstand for self service stores.

Combination Unsuggested

Not only is it admitted that the prior art does not show the use of a turntable in a checkstand but defendant appellees' expert recognized where the prior art failed to suggest the use of a turntable in the manner disclosed and claimed in the George patent in suit. See the testimony at R. pg. 180 where it is stated:

"Q. Mr. Sellers, you stated that in your opinion the Price patent 2,268,899 suggested the addition or substitution of a rotatable turntable to the belt type or sraight counter type check stand as shown in other patents.

A. *May I interrupt?* I don't believe, counsel, I said that. *I don't believe I said the Price patent suggested that substitution.*

Q. You stated, I believe, then, that the turntable of Price could be incorporated in the others, is that it?

A. That is correct.

* * * * *

Q. Well in either case, wouldn't the turntable 50 of Price be positioned alongside of the cash register support panel just as the conveyor mechanism is in Bradley and Turnham?

A. It certainly would be adjacent the cash register.

* * * * *

Q. Is there any suggestion or any requirement for the purposes of the Price machine that the articles conveyed be checked or recorded?

A. No."

Improved Results Achieved by Patent in Suit

First and foremost, the patented checkstand advances the articles of a purchase to the checker in a new manner that greatly facilitates the checking operation. All parties to the suit agree on this improved result. See plaintiffs' Exhibits 13, 25, 30 and 31, (R. pgs. 270, 295, 298 and 299) in which all parties advertise a reduction of 25% to 33% in the number of checkstands needed. See also the statement of appellees' expert at R. pg. 173 that this reduction is a substantial saving. As is clearly illustrated in plaintiffs' exhibits 8 and 9 (R. pg. 261 and 262) all the articles placed on the turntable of the patent in suit are advanced arcuately to the same position immediately alongside of the cash register. This is the *common or assured checking position* previously referred to and the checker can rely on all articles reaching it. In their final movement they are moving transversely toward the cash register and checker and away from the customer. This has the advantage over belt type checkstands of the prior art of bringing all items of a purchase into the range of vision of the checker as he looks at the cash register and the immediately adjacent part of the turntable. As shown by the shaded areas of the two figures in Exhibit 8 all articles are visible on the patented checkstand while some at the outer side of the belt type checkstand are out of the range of the checker's vision unless the checker turns his head (R. pgs. 51-52).

A further advantage of the new direction of advance is improved reachability as pictured in plaintiffs' Exhibit 9. The checker can always reach automatically to the same common checking position on the stand. The normal swing of the checker's arm includes all the items on the turntable of the patented checkstand but does not reach the articles on the outside of the belt type checkstand and this is where

a great many of the articles are placed by customers in actual practice (R. pg. 54).

Another advantage of the new direction of approach of articles on the patented checkstand in suit is the ease with which the price of the article can be identified. Note that each article approaches almost directly toward the checker and along his line of vision, not sidewise across his vision. In this manner it is becoming progressively closer and clearer without transverse motion and it is easier to identify and read the price stamp or figure on the article than it is when the article moves longitudinally along the belt type checkstand and transversely past the checker (R. pg. 55). If a can or package is upside down and the price concealed, the checker knows it will come to him to be picked up and turned over. He does not have to lean out to get it.

All of the three preceding advantages or improvements of included vision, easy reachability and direct approach for easier pricing are especially important when it is considered that each function or operation occurs 10,000 or more times in a checker's working day (R. pg. 52-53).

A second improved result of the new line of motion of articles on the patented checkstand in suit is the definite reduction in the tendency of customers to slip or move articles past the checker without the article being checked (R. pgs. 239-240). On a belt type stand all the articles move longitudinally of the counter and transversely between the checker and the customer. It is quite common for customers, either with larcenous intent or with an honest but mistaken intent to help, to move articles to the rear of the counter before they have been checked. When the checker is busy with a large order these movements are often not detected and a loss to the store results. On the other hand, the turntable of the patent in suit moves articles directly away from the customer as she stands fac-

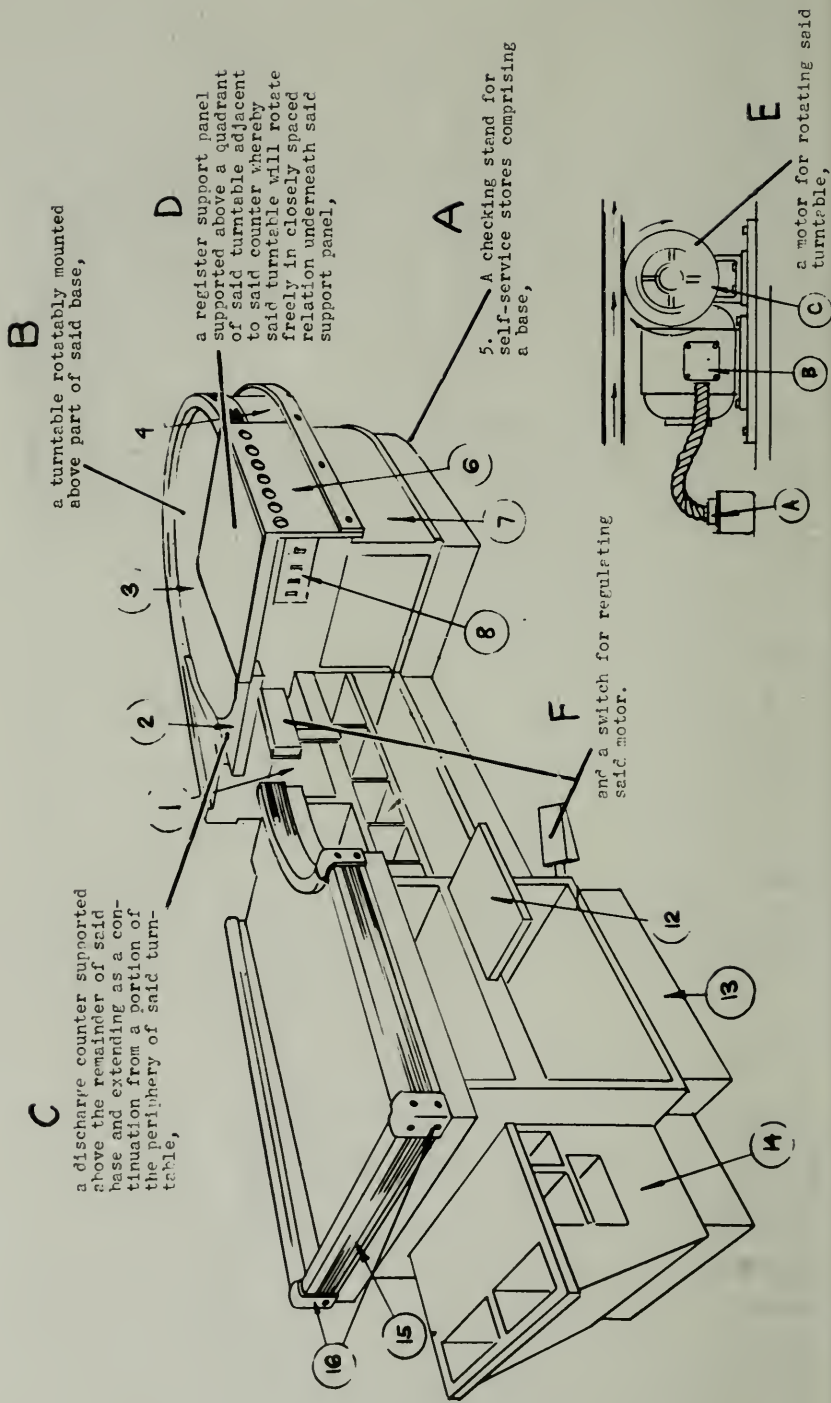
ing the checker and there is no need or excuse for the customer to take any article out of its normal path of travel toward the checker. In actual practice the purchasing public has shown no tendency to handle articles once they are placed on the turntable so the checker handles and checks all articles and losses to the store have been greatly reduced.

A third advantage of the rotatable turntable of the patent in suit is not described in the patent but nonetheless results from the structure shown. As appears most clearly from plaintiffs' Exhibit 7F and explained at R. pg. 49, instead of pushing her cart of groceries ahead of her along the front side of the counter of a belt type stand, the customer unloads her cart at the front of the turntable ahead of the cash register where she can stand beside of and reach the bottom shelf of the cart. She then disposes of the empty cart in an aisle behind the checker and has both hands free to handle her purse and receive change. Also articles cannot be left hidden on the lower shelf of the cart to be picked up and taken away without paying for them after passing the checker as can be done with the belt type stand where the customer retains control of her cart until she has passed the checker.

Accused Devices

Three commercial structures of the defendant appellees, Check-A-Matic, are charged to infringe the patent. These are designated as models C-2 shown in plaintiffs' Exhibit 12, (R. pg. 269) and FD-5 shown in defendant Check-A-Matic Exhibit C (R. pg. 305) and C-3 shown in plaintiffs' Exhibit 32 (R. pg. 300). One commercial stand of the defendant appellee Du-More is charged to infringe and this is disclosed in defendant appellee Du-More's Exhibit D-1 to be submitted as a physical exhibit under Rule 16.

Claim 5 of the George patent
applied to Check-A-Matic models C-2, C-3



Check-A-Matic Models C-2, C-3

For the convenience of the Court a picture of Check-A-Matic model C-3 check stand is reproduced on the opposed page with the separate elements of claim 5 of the patent in suit printed therearound and identified with portions of the check stand. The model C-2 is almost identical as will be pointed out. The stand includes a suitable base indicated by the note A over the forward end of which a rotatable turntable is mounted as indicated by the note B and reference numeral 3. Along the left rear sector of this turntable there is positioned a discharge counter conformed at its front end to the periphery of the turntable and extending over the remainder of the base as indicated by the note C and reference numeral 2. This stand as sold included a well or cutout portion 1 in the discharge counter designed to receive a weighing scale so that the platform of the scale is a flush continuation of the discharge counter 2. Positioned over the right rear quadrant or sector of the rotatable turntable is a generally rectangular support panel indicated by the note D. A motor indicated separately by the Note E is mounted in the base and connected to rotate the turntable B in a counter clock-wise direction so that articles placed on the turntable will be carried against the side edge of the register support panel, element D. Two switches, one operated by the checker's hip and the other by the checker's foot as indicated by the note F are provided for controlling the motor E and the turntable B.

In this C-3 stand the left edge of the register support panel D is inclined relative to a true radius of the turntable so that articles tend to travel rearwardly along the edge of the support panel to the discharge counter C. In the C-2 models of the stand the left edge of the register support panel was disposed along a true radius of the turn-

table. The distinction is submitted to be immaterial in view of the proper scope of the claims of the patent.

Speaking with reference to the distinction between the Check-A-Matic FD-5 model and the C-3 model before the Court, Check-A-Matic's attorney stated at R. pg. 79:

"There were a few of these stands (C-3) made and sold. *That we cannot deny. We are faced with that.* How it happened may come out. 'The current model (FD-5) is one in which this support panel is cut to fit the periphery of the rotating disc * * *.' (Emphasis and explanation in parenthesis added.)

Check-A-Matic Model FD-5

For convenience there is reproduced on the opposed page a picture of defendant appellee's Exhibit C showing the FD-5 model check stand with the elements required by claim 6 of the patent applying thereto. The check stand includes substantially the same base as the C-2 and C-3 described above and includes a rotatable receiving table indicated by note A. A stationary guard rail extends around the substantial portion of the receiving table as indicated by note B and a discharge counter indicated by note C is positioned with its forward end conformed to the left rear sector of the periphery of the receiving table, B. A stationary bar or arm projects forwardly from along side of the discharge counter to the center of the rotatable receiving table in closely spaced relation over the receiving table and constitutes means forming a stop for articles on the receiving table as indicated by note D. A register supporting panel having rectangular rear and side edges and a concavely curved front edge is positioned to the rear of the rotatable receiving table with its left end supported over the bar or article stop and with its concave edge care-

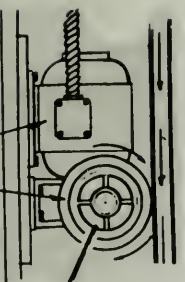
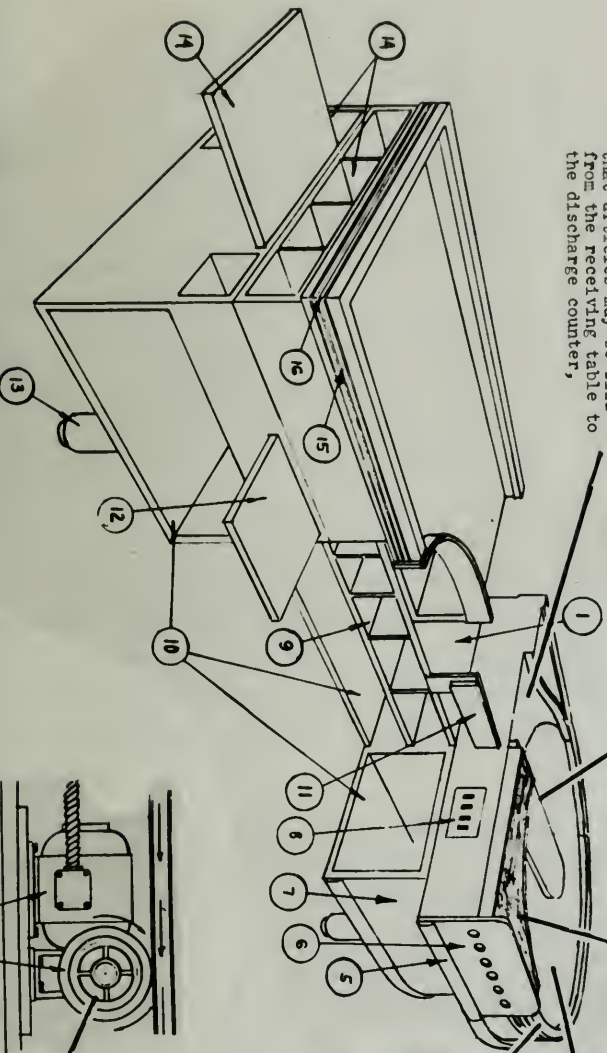
Claim 6 of the George patent
 applied to Check-A-Matic model FD-5

D means forming a register support a stop for articles on the receiving plane of said receiving table at the side of said stop,

C a discharge counter disposed in the plane of said receiving table and having a portion thereof conformed to a segment of the table so that articles may be slid from the receiving table to the discharge counter,

6. An apparatus of the class described comprising a rotatable receiving table, **A**

B a stationary guard rail for a substantial portion of the rim of said receiving table,



E and means for rotating said receiving table.

fully maintained along the periphery of the rotatable receiving table. This constitutes a register support and is designed to support a cash register above the plane of the receiving table and at the side of the bar or stop as indicated by note D. A motor for rotating the receiving table is enclosed in the base.

In practice or use, the cash register is positioned on the cut away register support panel in overhanging relation to the rotatable receiving table. As is shown by testimony R. pg. 65-71 and by plaintiff appellants' Exhibits 10A, B, C and H (R. pg. 263-265), in many instances the overhanging of the cash register is so great as to cause the cash register to overbalance and tilt downwardly toward the rotatable receiving table and in order to counteract this tendency the user of the check stand interposes a block or wedge between the front left corner of the cash register. *The article stop and bar actually becomes part of the register supporting structure located over the rotatable receiving table.*

It is true that there is evidence that some check stands of this type are operated without any support and physical connection between the article stop or bar and the front edge of the cash register but this is submitted to be immaterial in view of the use and mode of operation to which the check stand is capable of being adapted and by which it is actually operated in the trade as noted in the preceding paragraph.

It should be noted that the left side edge of the article stop or bar extending over the rotatable receiving table in the FD-5 is inclined somewhat relative to a true radius of the receiving table so that there is a camming or feeding action of articles rearwardly along the side of the stop.

Mode of Operation

In each of the C-2, C-3 and FD-5 Check-A-Matic models the customer approaches the front of the stand and places her purchases on the front of the rotatable receiving table. The checker actuates the turntable to advance the articles around to the article stop or bar and in the final feeding motion of these articles they are directed transversely of the check stand away from the customer to the same common checking position closely alongside of the cash register. The article stop and cash register prevent continued rotation of the articles and locate the articles closely alongside of the cash register for easy viewing and checking and removal to the discharge counter by the checker. Note that this function and mode of operation utilizes all of the motions and achieves all of the advantages of the patented George check stand. Note also the testimony of *defendant appellees' expert* at R. pg. 213 where it is stated:

“Q. As far the checker is concerned, would you say that there is any distinction in the functional properties of the C-2 and the FD-5 stands?

A. No. I think so far as the operator and the operation is concerned, they would function very much the same.”

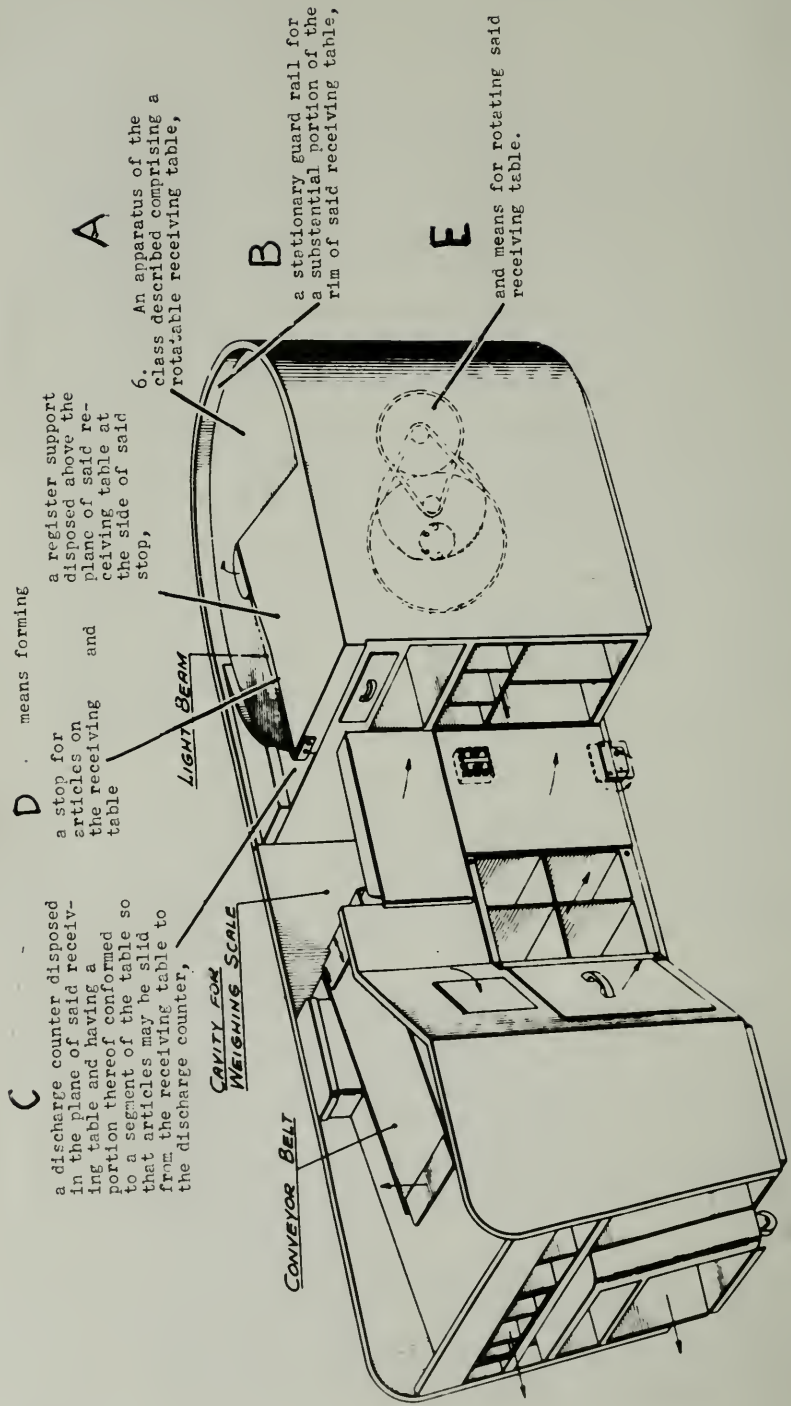
Note the witness's further testimony at R. pg. 214:

“Q. Is it not possible to operate each of the C-2 and FD-5 Check-A-Matic stands in exactly the same manner as the George or Spee-Dee check stand in that articles can be rotated close to the side of the cash register and intercepted manually before they reach the register?

A. That is correct.

Q. Is it not also possible to operate the George stand or the Spee-Dee commercial form thereof and the Check-A-Matic stand in identically the same manner in that articles may be rotated alongside

CLAIM OF THE GEORGE
patent applied to Du-More



C

a discharge counter disposed in the plane of said receiving table and having a portion thereof conformed to a segment of the table so that articles may be slid from the receiving table to the discharge counter,

D

means forming

a stop for articles on the receiving table

A

6. An apparatus of the class described comprising a rotatable receiving table,

B

a stationary guard rail for a substantial portion of the rim of said receiving table,

E

and means for rotating said receiving table.

and against the stop and the turntable stopped for picking up the articles?

A. Well, I agree with that, except that rotation alongside. In the George patent construction, they are moved up against the stop and stopped, whereas in the Check-A-Matic construction, they are moved to that stop and by virtue of the inclination of the guide member, unless the table is stopped, they are moved laterally toward the discharge. *If the table is stopped, the net result is the same in each case."*

Defendant Du-More's Structure

Reproduced on the opposed page is a picture of defendant Du-More's Exhibit D-1 (Physical Exhibit) with the elements of claim 6 of the patent in suit applied thereto. The stand includes a rotatable receiving table shown by note A with a stationary guard rail shown by note B. A discharge counter indicated by note C is disposed in the plane of the receiving table with its forward end conformed to the left rear segment of the periphery of the receiving table. A generally rectangular register support panel is positioned over the right rear sector or quadrant of the receiving table with its left edge extending over the receiving table and alongside the forward end of the discharge counter C. A motor indicated conventionally at E is positioned in the base for rotating the receiving table.

The Du-More stand provides a light source or lamp adjacent the center of the rotatable receiving table that directs a light beam rearwardly in spaced relation along the side of the register support panel. The light beam actuates a photo-electric cell positioned at the rear edge of the register support panel and, in theory, articles rotated by the receiving table were supposed to intercept the light beam and actuate the photo-electric cell to turn off the motor E before the article actively engaged the side edge

of the register support panel. In actual practice it was shown that the overrun or inertia of the receiving table caused it to carry any article against the side of the register support panel after the power was turned off. Defendant appellee's expert explained this on direct examination (R. pg. 127) and it was confirmed by appellants' witness at R. pg. 89.

Regardless of the employment of the photo-electric cell, which is no more than a switch to control the motor as defined by claim 5, to automatically control the rotatable receiving table, the Du-More check stand still functions to receive the articles of the customer's purchase and rotate them around to a common checking position directly alongside of the cash register within easy view and reach of the checker. The final movement of the articles is transverse to the counter and away from the customer and no articles can escape the checker without being checked. The Du-More stand thus embodies and utilizes all of the essential structure and features of the George patent in suit, with the frill of an automatic electric eye added.

All Accused Devices Infringe

Preceding pages 28A and 31A graphically apply claim 6 of the patent in suit to the Check-A-Matic FD 5 and Du-More stands. Page 27A applies claim 5 to the Check-A-Matic C-3 stand. Pages II to XIII of the appendix here-to similarly apply the remaining claims charged to be infringed to the accused stands.

Analysis

It is submitted that the foregoing facts and relationships between the patented structure, the prior art and the accused structures fully support and require, as a matter of law, a finding of validity of the George patent in suit and infringement thereof by the accused devices. Appellants do not resort to or advance any novel or strained principles of law in order to support this contention but rely entirely on well recognized legal principles, definitions and tests of invention. As was pointed out at the beginning of the statement of facts, page 8, the device of the patent in suit is not complex but the simplicity of a structure has long been recognized as insufficient to support a finding of non-invention. In fact simplicity is the essence of true invention. As far back as 1850 the report of the Commissioner of Patents to the Senate for the year 1849 contained the following statement on page 419:

“Simplicity is the essence of true invention, and it is often interesting to see after a multitude of complicated inventions to attain a certain end, some discerning, or perhaps fortunate inventor, demolish a whole labyrinth of combinations, and arrive at the result by means so simple as almost to rob invention of its charms. Such means as one would suppose should have been the first and not the last resort. Mingled with the surprise are often times feelings of regret and chagrin by his competitors, that they had not discovered this most obvious path. To such cases the words of *Milton* are quite apropos:

“The invention all admired, and each how he
 To be the inventor missed; so easy it seemed,
 Once found, which yet unfound, most would
 have deemed
 Impossible!”

This quotation is certainly applicable to the present case. On the assumption that copies of this report are not generally available photostatic copies of the title page and quoted page 419 are attached as an appendix to this brief.

The reasoning of the above quotation is still sound and applicable over 100 years later and has been recognized recently by this court in the previously cited cases of *Muench-Kreuzer Candle Company v. Wilson*, 246 F. 2d 624 and *Patterson-Ballagh v. Moss*, 201 F. 2d 403. The true test of invention and patentability is submitted to have been stated by the Supreme Court in *Sinclair and Carroll Company v. Interchemical Corporation*, 325 U. S. 327 where it is stated,

“Under this test some substantial innovation is necessary, an innovation for which society is truly indebted to the efforts of the patentee.”

There can be no question in the present case but that the patentee George conceived and was allowed a patent on a check stand that was a material improvement over check stands of the prior art. It has frequently been held that the solution of a problem of long standing is the best evidence of an invention. *Baker-Cammack v. Davis* (C. A. 4) 181 F. 2d 550.

As has been pointed out, the case of *Atlantic and Pacific Tea Company v. Supermarket Corp.*, 340 U. S. 147 establishes the existence of a problem or need in the art for an improved check stand. That case was decided upon a patent filed in 1938 almost ten years prior to the application for the George patent here in suit and issued in 1941, six years prior to the George application. The decision indicates the great interest which the grocery trade expressed in any check stand purporting to be an improvement. The patentee, George, thus entered an active field

where others had tried and failed or at least had not succeeded to the degree which George succeeded. Nor did George utilize or rely on a newly discovered element or tool to gain his ends. He used the same means available to all his predecessors but added his touch of inventive skill to make a materially improved device. His success is attested to by great commercial acceptance and by the copying by at least the two appellee infringers.

It is pointed out that the Supermarket case did not in any way overrule or modify the above quoted portion of the 1850 report of the Commissioner of Patents or the Sinclair and Carroll case. It merely applied these old rules to the particular situation and facts involved and established an additional test of patentability relating to combinations of old elements. Appellants are perfectly willing and even urge that the rule of the Supermarket case be applied to the facts of this case in the same manner as this Court has already followed the case in the above cited Patterson-Ballagh and Muench-Kreuzer cases.

The Supermarket case laid down or rather restated the old requirement of a novel and unsuggested coaction between the elements of the device claimed. They defined novel coaction as a situation or relationship in which the end result, or the sum of the functions of the several parts of the device, was more than the sum of the individual elements thereof, considered separately. It is pointed out that the facts of the present case exactly fulfill these requirements as defined by the Supreme Court. At pages 13-14 *supra* it is pointed out in detail wherein the end result of the George stand is more than the sum of the separate functions of its parts. *Appellees can point to no part of the record that supports a contrary view.*

Novel Coaction

The record in this case clearly shows that the turntable of the George checkstand coacts in a novel manner with the cash register support and article stop to advance the articles of a customer's purchase around from a remote unloading position always to the same checking position that is immediately alongside of the cash register. This positioning of the articles has multiple advantages in that the articles can be easily reached as well as viewed by the checker while the checker stands in facing and operating relation to the cash register. It also locates the articles where they are all easily movable from the checking position directly to the discharge counter. That is, the proximity of the turn table and cash register support to the discharge counter is important in order to permit full utilization of the articles advancing function of the turntable. The Court will appreciate that the turntable and cash register support of the George patent would be of little utility and certainly no improvement over the prior art if the discharge counter were not positioned with its forward end closely adjacent to the side of the cash register support. For instance, if the discharge counter were to extend from the right edge of the cash register support instead of the left, operation of the stand would be slowed to such an extent as to be unusable.

The record is complete with many instances pointed out above wherein the defendant appellees and their expert admitted the novelty of the George combination and *they cannot point to any portion of the record which supports a conclusion or finding that the prior art in any way suggests the combination claimed* or the highly desirable functions achieved by the combination. Where all prior belt type checkout stands moved articles longitudinally past the

side of the checker so that the checker had to continually turn his head while following the movement of the articles, the patented stand brings the articles around in a arc that is generally tangent to the checker's line of vision as he stands facing the cash register. Thus as shown in plaintiff appellants' Exhibit 8 and 9 the articles directly approach the checker and can be observed and reached without turning substantially as each successive article is identified and checked. Also the articles are all advanced to a common position within easy reach of the checker rather than staying on the outer or far side of a longitudinally moving belt type conveyor as is the case with a majority of articles placed on these belt conveyors (See R. pg. 107.)

Utility and Acceptance

Defendant appellees can not contend that the check stand of the George patent is not useful and commercially successful. They have each adopted the essential features of the George stand and advertised and lauded its advantages to the public in their advertising. (See plaintiffs' Exhibits 13 and 30) (R. pgs 270 to 272 and 298). In the previously cited Patterson-Ballagh case this Court has properly held that the advertising of an infringer is properly considered by the court as proof of what the accused device does. In the case of *Coleman v. Holly Manufacturing Company*, 233 F. 2d 71, this Court further noted that the defendant's adoption of all of the essential parts of a patented device after it was proved commercially successful was indicative of the materiality of the improvements in the patented device.

No Prior Art Anticipation

Still following the reasoning of the Patterson-Ballagh case, anyone contesting the validity of a patent has the burden of proving that invalidity, and *this appellees have not done*. Their own expert admitted that the patents he considered most pertinent, Price, Turnham and Bradley, suggested only the positioning of the Price turntable *along-side* of the cash register *but not partially under it* (R. pg. 181).

No art is cited by appellees that discloses anything pertinent not already considered by the Patent Office during the prosecution of the George patent in suit. Note that the Bradley and Price patents were cited by the Patent Office in the George application and that Turnham does not show anything not shown by Bradley. This fact in itself has been recognized as a cogent reason for refusing to overthrow the statutory presumption of validity of a patent. *Coleman v. Holly*, 233 F. 2d 71 and *Gomez v. Grant*, 177 F. 2d 266.

Note that the facts in this case are even more persuasive than in the Coleman case. There all elements of the patented device were found in the *identical art* of the patent (heaters) but here appellees have to go out of the check stand art into the remote art of industrial conveyors to find a turntable. They admit that George was first to put a turntable into a checkstand. No checkstand is cited which is adapted to have a wheel or turntable rotating partially under its cash register. *All checkstands and register supports cited by appellees have continuous supports all around that obstruct and prevent the positioning of a turntable partially underneath them*. Therefore, they cannot suggest or anticipate the positioning of a turntable partially underneath them.

*Invention Was Completely Adopted by Defendant-Appellees
(i. e. Infringement)*

It has aptly been said by the Court Of Customs And Patent Appeals in the case of *In re Bisley*, 197 F. 2d 355 at [16-19] page 363 that:

“Moreover, the conception of a new and useful improvement must be considered along with the actual means for achieving it in determining the presence or absence of invention.”

Not only do defendant appellees fail to cite any art that discloses the concept of the patent in suit but they utilize all elements of the patented concept in their commercial structures. The completeness with which appellees adopted the concept of the invention is important because as restated in *Florence-Mayo Nuway Co. v. Hardy*, (C. A. 4) 168 F. 2d 778 at 782:

“The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think.”

The claims of the patent and the accused structures are of course the basic factors on which a determination of infringement or adoption of the patented concept will be determined. It is not necessary here to go into a prolonged analysis of these factors. *The expert witness of defendant appellees has done that for the Court.*

Du-More Infringement

With respect to the accused structure of appellee Du-More reference is made to pages 131 to 145 of the record for a complete analysis *by defendant's expert on direct examination*, of the infringing character of the accused device. Excerpts of his analysis with reference to claim 6 are here reproduced:

“Q. * * * would you identify the rotatable receiving table in the George patent?

A. That bears the reference character 6 * * *.

Q. Do you find a corresponding part in the Du-More check stand?

A. It is also labeled turnable in Fig. 2 of the Exhibit D-1.

Q. * * * a stationary guard rail for a substantial portion of the rim of said receiving table * * *.

A. In the George patent, that rim surrounds the turntable 6, as shown in Figs. 1 and 2, and there is a functionally corresponding member shown in figures 1 and 2 of the Du-More construction illustrated in Defendant's Exhibit D-1.

Q. * * * a discharge counter disposed in the plane of said receiving table and having a portion thereof conformed to a segment of the table so that articles may be slid from the receiving table to the discharge counter—* * *

What is the corresponding structure in the Du-More device?

A. In the Du-More construction, the discharge counter unit could be said to be shown separate in Figure 2. It is moved over for the purpose of illustrating * * *.

Q. * * * means forming a stop for articles on the receiving table and a register support disposed above the plane of said receiving table at the side of said stop—

* * * Do you find a similar or corresponding structure in the defendant Du-More's check stand?

A. In the Du-More check stand, there is a register supporting panel, so indicated in figures 1 and 2 of Exhibit D-1. There is an edge of the panel which, if needed, could perform the function of a stop. * * *

Q. Finally claim 6 calls for

—means for rotating said receiving table—

Do you find such motors in both the George patent and the Du-More check stand?

A. Yes * * *.”

Check-A-Matic Infringement

The record does not contain such a clearly itemized statement of infringement by the model C-2 Check-A-Matic checkstands but attention is invited to the statement quoted on page 22 *supra* where the defendants' attorney said they would just have to live with the fact that they had made the stand. With reference to the current FD-5 stand the following comments of defendants' expert beginning at R. pg. 206 are illuminating:

“Q. Referring now to claim 6 and to the FD-5 check stand, do you find in the FD-5 check stand a stop means *to positively bring all articles to a stop* alongside the cash register?

A. That does not accurately define the Check-A-Matic construction in which the guide member, which is marked 17 in Exhibit C, functions to redirect the direction of travel of the moving articles from a circular movement into a more or less radial movement toward the discharge outlet.

Q. Then do you find means forming a stop for articles on the receiving table?

A. *In the sense of bringing articles to a stop, no.”*

This is the only comment of appellee Check-A-Matic in regard to the FD-5 stand and claim 6 of the patent. It attempts to interject into the claim an element of *absolute*

stopping but no such element appears in the claim. All elements of the claim are present as shown graphically on page 28A *supra*. Such minor changes in structure as Check-A-Matic have made in their FD-5 do not abandon or discard the functional concepts of the George stand and under the rule stated in *Graver Tank Co. v. Linde*, 339 U. S. 605, the FD-5 structure is the equivalent of the device patented to George. Infringers cannot practice a fraud on the patent by minor changes in structure.

The application of each claim, charged to be infringed, to the accused structures is graphically set out on pages II to XIII of the appendix to this brief.

The Court of Appeals of the Second Circuit has held it to be proper for an appellate court to pass on issues not decided by the trial court if the issues were fully presented, *Guide v. Desperak*, 115 U. S. P. Q. 156; 249 F. 2d 145.

CONCLUSION

There is no question from a procedural standpoint but that this Court will reverse judgments of the District Court that are in error in law or in fact. The previously cited cases of *Coleman v. Holly* and *Muench-Kreuzer v. Wilson* each do that and it is submitted that the record in this case clearly establishes the following facts and errors in the District Court's decision.

1. Novelty of the patented George check stand is admitted. No one ever used a rotatable turntable in a checkstand before.

2. The utility of the George checkstand is not controverted in the record. Appellees, by their adoption of the

patented device and laudatory advertising thereof have admitted its utility and desirability.

3. Appellees do not submit any evidence controverting the evidence of new coaction between the elements of the patented device.

4. The George stand advances the articles of a customer's purchase in a new and advantageous manner to the checker.

5. There is new coaction of parts in the patented stand in that the cash register support panel not only supports the cash register but does so in a new relation to the article advancing turntable so that articles are intercepted alongside of the cash register rather than going past the register.

6. There is a coaction between the turntable, discharge counter, article stop and register support in that the turntable advances articles transversely across the end of the discharge counter, away from the customer and toward the stop alongside of the cash register into easy viewing and reaching position relative to a checker standing in front of the cash register support.

7. The parts or elements of the patented stand acting in concert do more than they would do separately. If the register support were not positioned to support the cash register over a sector of the turntable the articles would not be brought to the highly desirable common checking position closely alongside the cash register for easy checking and would not advance directly toward the checker for easier identification. If the article stop across the turntable were not located directly alongside the cash register and directly adjacent the front end of the discharge counter the articles could not be easily removed to the discharge counter after checking.

8. The accused devices, Check-A-Matic models C-2, C-3 and FD-5 and the Du-More turntable model, all utilize the essential elements and operational concepts of the patented check stand for the same purposes as the patented stand.

9. The prior art cited by appellees does not disclose any pertinent structure or relationship not shown by the patents cited and considered by the Patent Office during the prosecution of the George patent in suit.

10. The patented device has been adopted and commercially accepted by the trade.

11. The need for a more efficient check stand had been recognized in the trade for a long period of time but no one prior to the patentee had been able to recognize or conceive the advantages to be achieved by the combination claimed by the patent.

12. The prior art does not suggest the combination of the patent in suit and defendant appellees have not sustained the burden of proof necessary to overcome the presumption of validity of the patent.

13. The George patent 2,599,909 discloses inventive ingenuity and the patent and claims 3, 5, 7 and 9 thereof are valid.

14. The District Court was in error in holding that all of the components of the claimed invention were disclosed in the prior art of the patent in suit. There is no evidence that the art of check stands ever included a rotatable turntable and the art of industrial conveyors in which a turntable is found is too remote to suggest the use of a turntable in a checkstand, especially in the particular relation claimed.

15. The District Court was in error in holding the claims of the George patent in suit are directed to a non-patentable

aggregation of old elements because there is a definite novel and patentable coaction between the elements of the patented device.

16. The District Court was in error in holding that the functions of the various components of the disclosed invention are no different from the function of the same components in the prior art because there is no evidence in the prior art of a register support adapted to support a register over a sector of a turntable or conversely, no evidence of a turntable arranged to advance articles transversely across the end of a discharge counter to a stop or obstruction position alongside of a cash register support.

17. The District Court was in error in holding that the difference between the invention of the George patent in suit and the prior art was obvious because there is no evidence indicating where or how the prior art teaches the combination claimed.

18. The judgments of the District Court in both cases appealed, being unsupported in fact and based on improper or insufficient application of the legal tests of invention should be reversed.

19. The record discloses where all the facts necessary to support a finding of infringement of the George patent in suit by the Check-A-Matic models C-2, C-3 and FD-5, and the Du-More checkstand shown in defendants' Exhibit D-1, are either admitted or presented and not controverted and these accused devices should be held to be infringements.

20. George patent 2,599,909 and claims 3, 5, 6 and 7 thereof disclose and claim a meritorious improvement in the checkstand art that is unsuggested by the prior art and the patent and claims 3, 5, 6 and 7 thereof are valid.

The Court is respectfully requested to reverse the decisions of the District Court in both cases appealed and render a decision consistent with the foregoing facts, including a determination of the infringing character of the accused devices.

Respectfully submitted,

WILLIAM T. ALVARADO SALES Co.,
SPEE-DEE CHECKOUT SYSTEMS, INC.,

By EARL & WEBB,

*Attorneys for Plaintiff-
Appellants.*

FRED H. MILLER,
HAZARD & MILLER,
Of Counsel.

APPENDIX

I.

TABLE OF EXHIBITS

References to pages of Transcript
of Proceedings in Trial Court

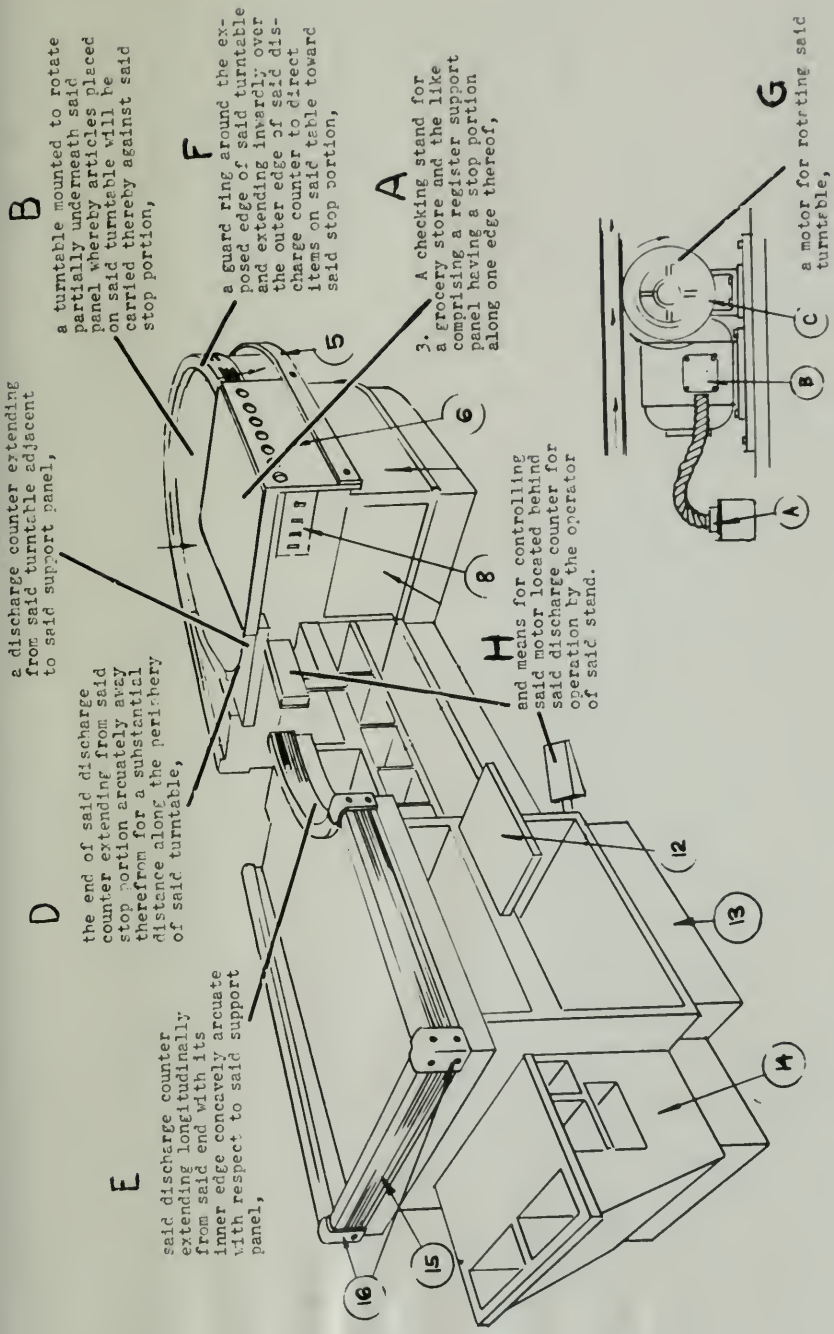
	Identified	Offered	Received
For Plaintiffs			
1	13	156	157
2	13	156	157
3	17	17	17
7A-7F	30	33	33
8	33	38	38
9	39	41	41
10 A, B.....	68	81	81
10C	69	81	81
10 H	72	81	81
11	184	184	185
12	184	185	185
13	184	185	185
14	184	185	185
15	184	185	185
16	184	185	185
19	184	185	185
20	184	186	186
25	184	186	186
26	184	186	186
30	315	315	315
31	335	336	336
32	356	356	356

For Defendant Check-A-Matic

A	121	123	187
B	121	122	122
C	122	123	123
D	122	123	123
E-2, 3, 4, 5, 6, 7, 8	365	372	372

For Defendant Du-More

A	210	214	215
C	255	255	255
E	425	429	429



III.

B
a turntable rotatably mounted
above part of said base,

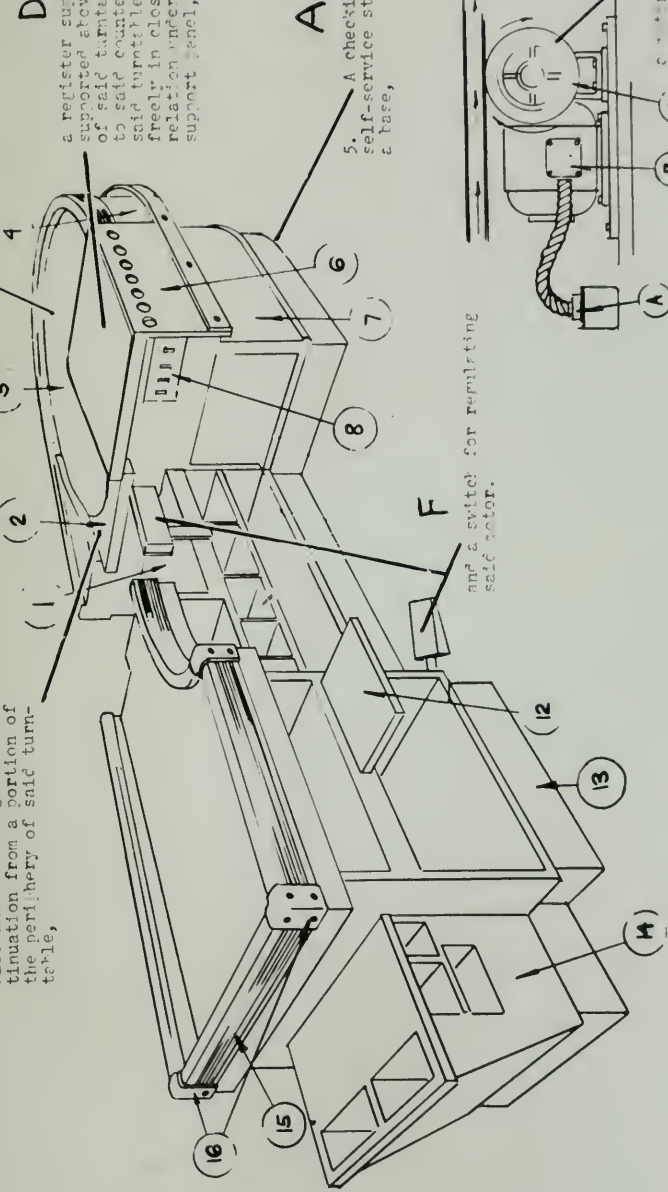
C
a discharge counter supported
above the remainder of said
base and extending as a con-
tinuation from a portion of
the periphery of said turn-
table,

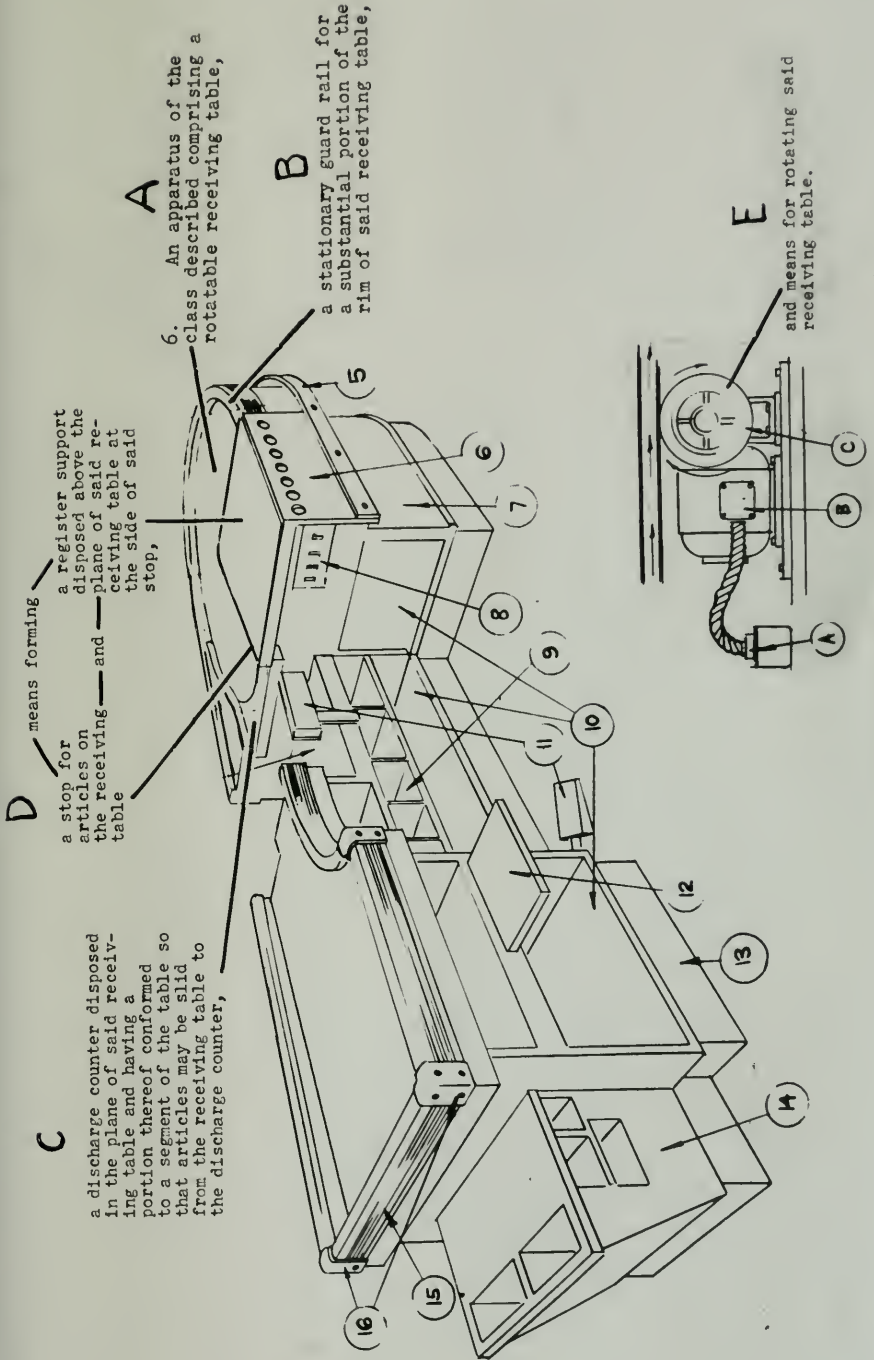
D
a register support panel
supported above a quadrant
of said turntable adjacent
to said counter whereby
said turntable will rotate
freely in closely spaced
relation underneath said
support panel,

A
5. A checking stand for
self-service stores comprising
a base,

F
and a switch for regulating
said motor.

E
a motor for rotating said
turntable,

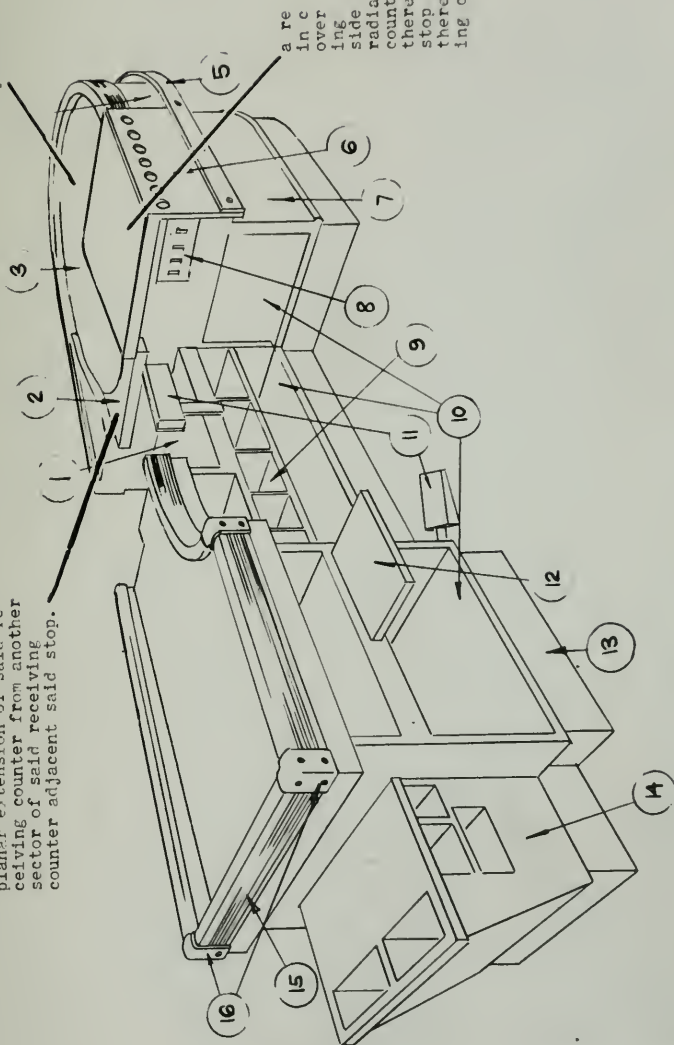




7. A checking stand for self-service stores comprising,

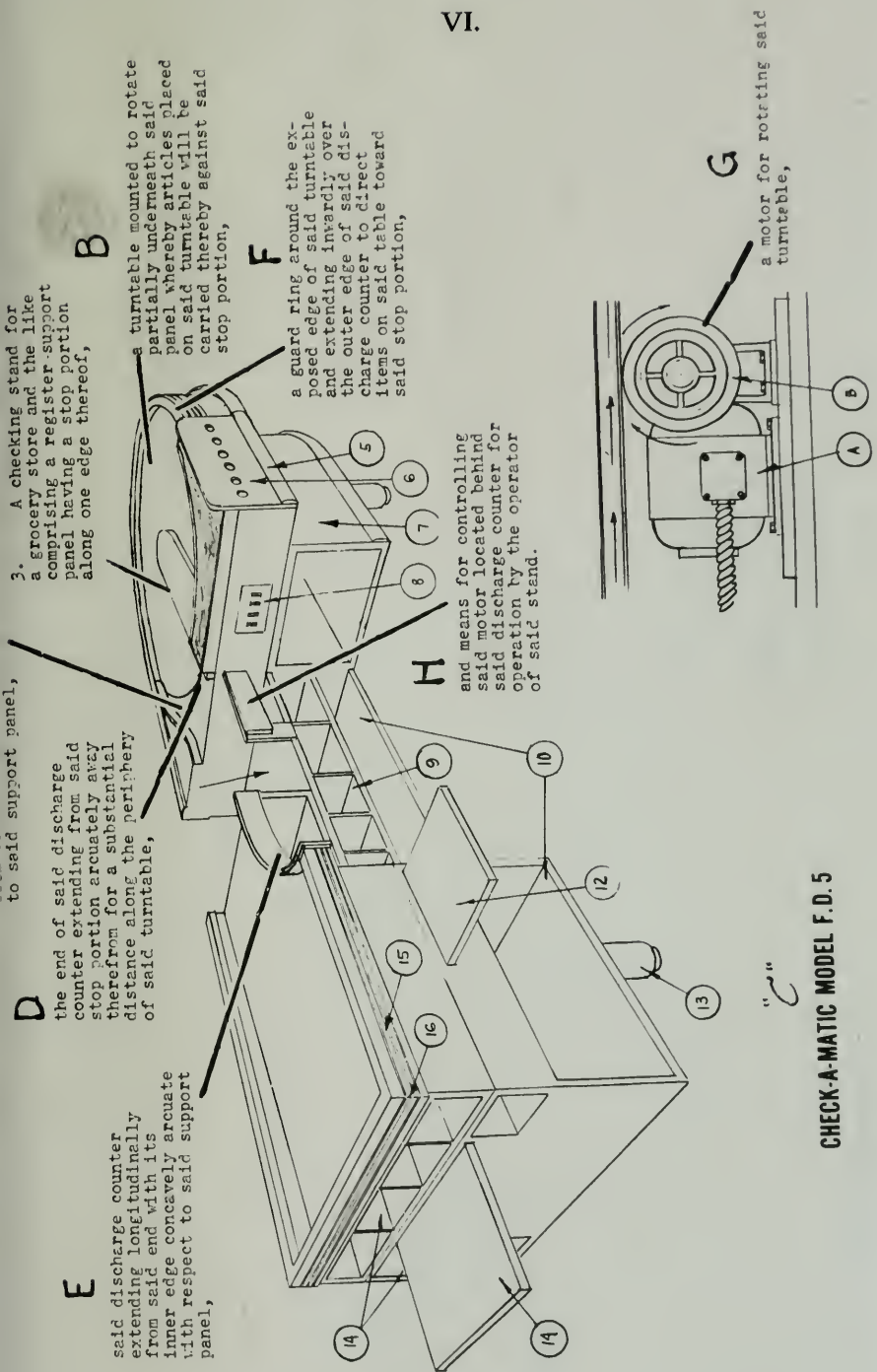
D
and a discharge counter extending as a generally coplanar extension of said receiving counter from another sector of said receiving counter adjacent said stop.

an item generally mounted on a plane of

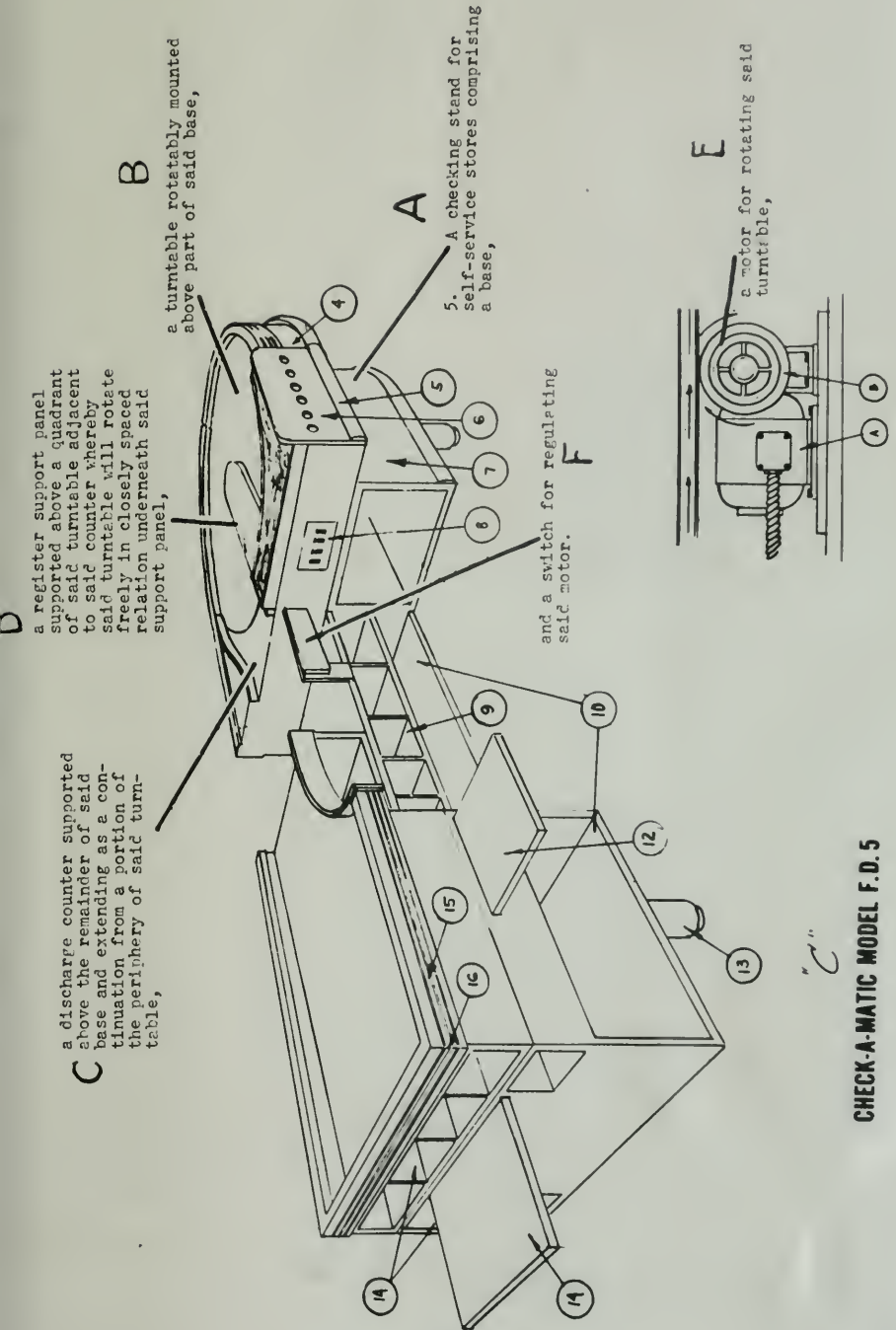


V.

side edge extending generally radially of said receiving counter to the periphery thereof to form an article stop for articles rotated thereagainst by said receiving counter,



CHECK-A-MATIC MODEL F.D. 5



C a discharge counter disposed in the plane of said receiving table and having a portion thereof conformed to a segment of the table so that articles may be slid from the receiving table to the discharge counter,

D means forming a stop for a register support articles on disposed above the the receiving and plane of said re- table receiving table at the side of said stop,

6. An apparatus of the class described comprising a rotatable receiving table, A

a stationary guard rail for a substantial portion of the rim of said receiving table,

3

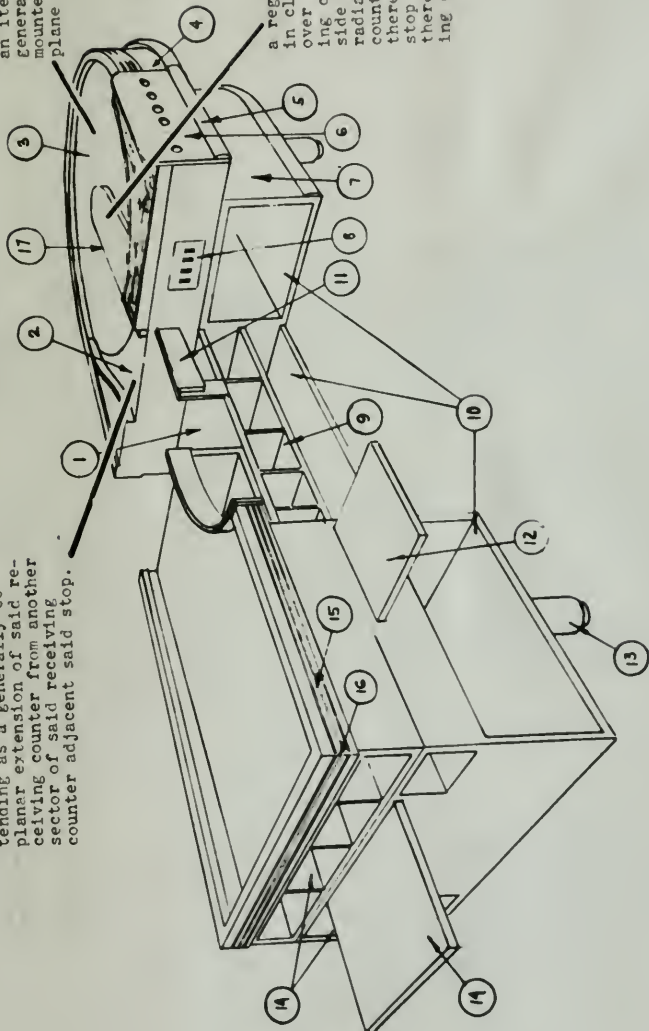
CHECK-A-MATIC MODEL F.D. 5

D

and a discharge counter extending as a generally coplanar extension of said receiving counter from another sector of said receiving counter adjacent said stop.

an item receiving counter of
generally circular outline
mounted to rotate in the
plane of its surface, B

a register support positioned in closely spaced relation over a sector of said receiving counter and having a side edge extending generally radially of said receiving counter to the periphery thereof to form an article stop for articles rotated thereagainst by said receiving counter,



CHECK-A-MATIC MODEL F.D. 5

C

a discharge counter extending from said turntable adjacent to said support panel,

A

3. A checking stand for a grocery store and the like comprising a register support panel having a stop portion along one edge thereof,

B

a turntable mounted to rotate partially underneath said panel whereby articles placed on said turntable will be carried thereby against said stop portion,

F

a guard ring around the exposed edge of said turntable and extending inwardly over the outer edge of said discharge counter to direct items on said table toward said stop portion,

X

G

a motor for rotating said turntable,

H

and means for controlling said motor located behind said discharge counter for operation by the operator of said stand.

D

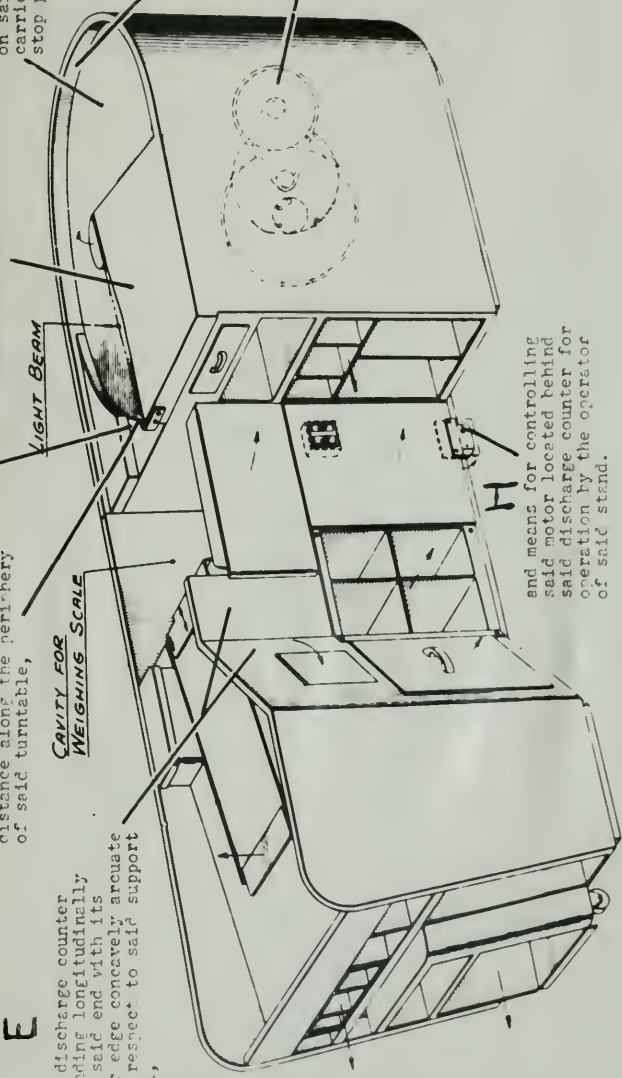
the end of said discharge counter extending from said stop portion arcuately away therefrom for a substantial distance along the periphery of said turntable,

CAVITY FOR WEIGHING SCALE

E

said discharge counter extending longitudinally from said end with its inner edge conceavely arcuate with respect to said support panel,

LIGHT BEAM



C
 a discharge counter supported above the remainder of said base and extending as a continuation from a portion of the periphery of said turntable,

B
 a turntable rotatably mounted above part of said base,

LIGHT BEAM

CAVITY FOR WEIGHING SCALE

CONVEYOR BELT

E

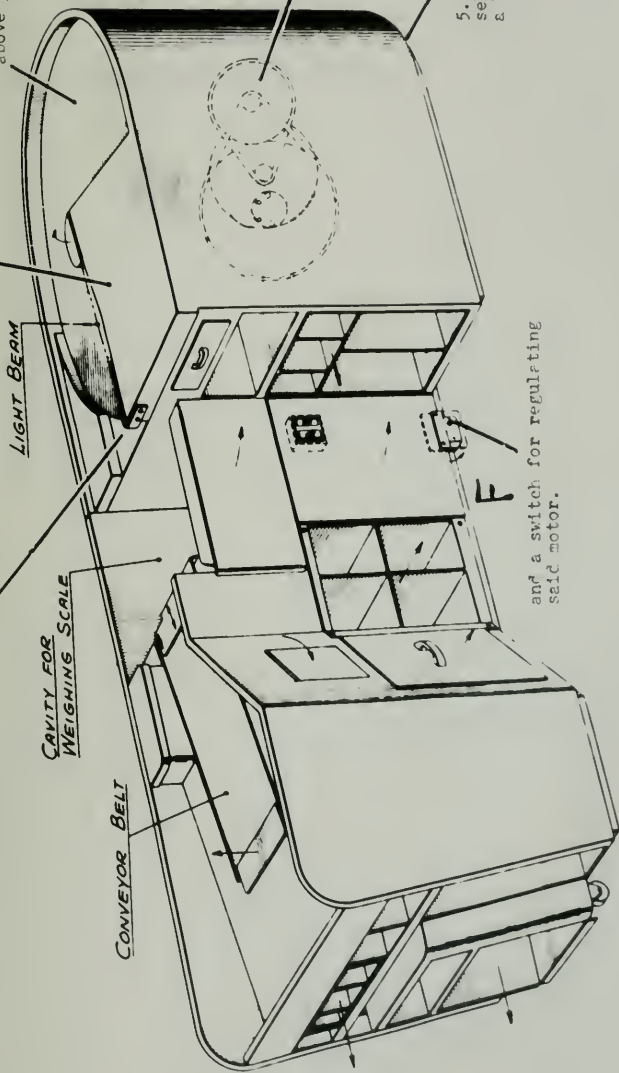
a motor for rotating said turntable,

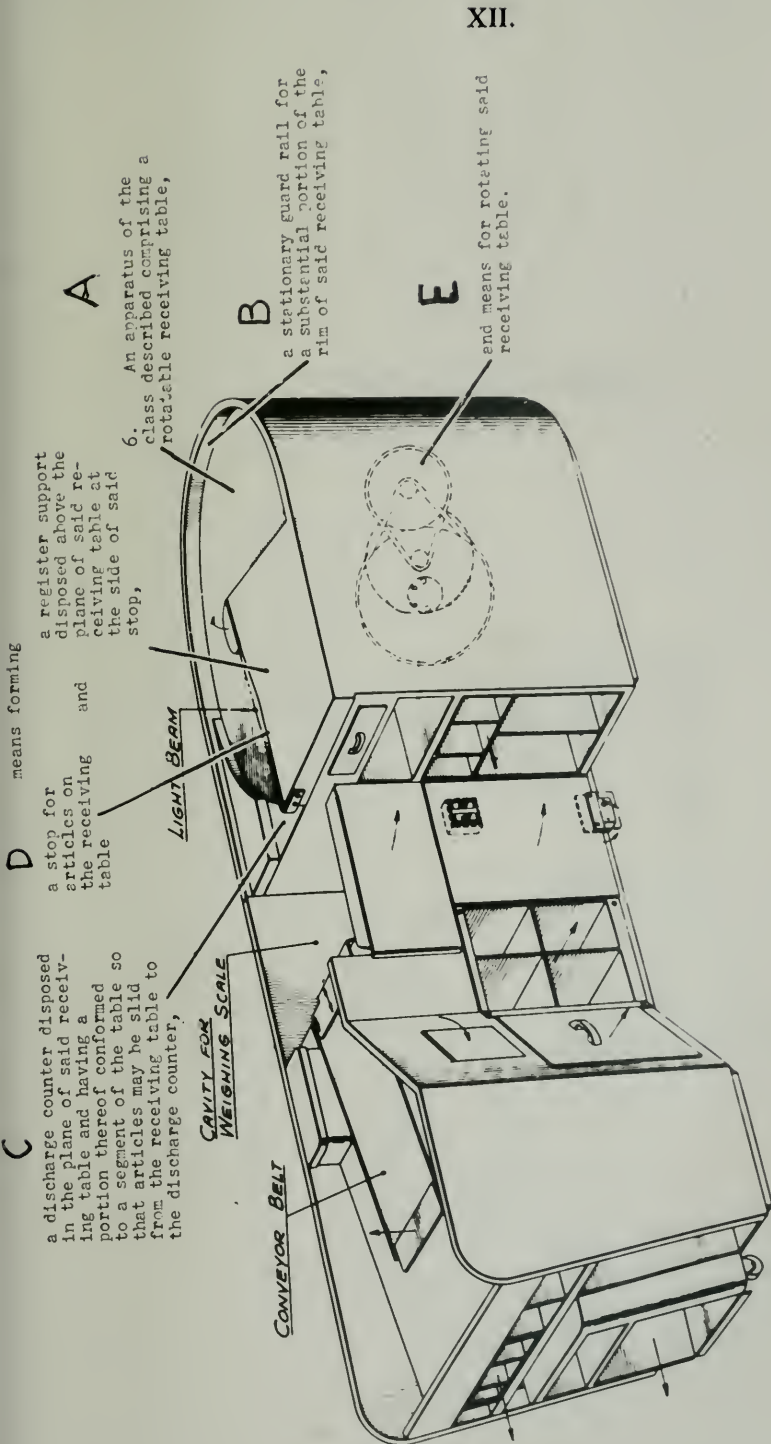
A

5. A checking stand for self-service stores comprising a base,

F
 and a switch for regulating said motor.

XI.





A A checking stand for self-service stores comprising,

D and a discharge counter extending as a generally coplanar extension of said receiving counter from another sector of said receiving counter adjacent said stop.

B an item receiving counter of generally circular outline mounted to rotate in the plane of its surface,

REGISTER SUPPORT PANEL

LIGHT BEAM

CAVITY FOR WEIGHING SCALE

CONVEYOR BELT

C

a register support positioned in closely spaced relation over a sector of said receiving counter and having a side edge extending generally radially of said receiving counter to the periphery thereof to form an article stop for articles rotated thereagainst by said receiving counter,

REPORT

OF THE

COMMISSIONER OF PATENTS,

FOR

THE YEAR 1849.

PART I.

ARTS AND MANUFACTURES.

CONTENTS.

- I. FINANCES AND STATISTICS OF THE PATENT OFFICE.
- II. INVENTIONS AND CLAIMS.
- III. EXAMINERS' AND MACHINIST'S REPORTS.
- IV. ORIGIN AND PROGRESS OF INVENTION.
- V. THE MOTORS: CHIEF LEVERS OF CIVILIZATION.
- VI. PROPOSED APPLICATIONS OF THE PATENT FUND.—1. PUBLICATION OF SPECIFICATIONS: 2. PREPARATION OF A GENERAL, ANALYTICAL AND DESCRIPTIVE INDEX OF INVENTIONS: 3. INSTITUTION OF NATIONAL PRIZES.
- VII. HISTORICAL NOTICES OF INVENTIONS, FROM ARCHIVES OF THE STATES.
- VIII. ON THE PROPULSION OF STEAMERS.

Simplicity is the essence of true invention, and it is often interesting to see after a multitude of complicated inventions to attain a certain end, some discerning, or perhaps fortunate inventor, demolish a whole labyrinth of combinations, and arrive at the result by means so simple as almost to rob invention of its charms. Such means as one would suppose should have been the first and not the last resort. Mingled with the surprise are often times feelings of regret and chagrin by his competitors, that they had not discovered this most obvious path. To such cases the words of Milton are quite apropos:

“The invention all admired, and each how he
To be the inventor missed; so easy it seemed,
Once found, which yet unfound, most would have deemed
Impossible!”

Such cases are the most embarrassing to your examiners. If measured by the length and breadth of novelty, little is to be found, while yet the measure of utility has in no way been made to appear. But to return to the churns.

A modification of the last named churn has been patented, in which the hole in the dasher at the lower part was large enough to contain a solid plunger, fitting loosely within the dasher, which acts the part of a second valve. There have been also several patents granted for ingenious forms of rotary atmospheric churns. These inventors crowded upon the office so numerous, that they were examined with the most rigid scrutiny, and on several occasions, actual demonstrations by experiment of making butter, was required of the applicants, to satisfy the office that the inventions claimed justified their pretensions to be real improvements. In most of these cases, the results were unfavorable to the inventor; but in some, patents were ordered to issue. On one occasion an experiment was performed (humorously characterized by a bystander as a “churn race,”) between a patented and a new churn, in which they both came out alike, making butter from new milk in two minutes and a half. Such a rapid separation of the butter, however, is by no means desirable, although this is the general aim of these improvements. We have it upon the highest chemical authority, that butter made so rapidly is not likely to be so good as that which is made slowly.

The above is a brief view of such patented inventions as have seemed to me to be notable among the many referred to me for examination during the past year.

Respectfully submitted,

CHAS. G. PAGE, *Examiner.*

ADDED ADMISSION FROM RECORD

Appellants call attention to the admission by counsel for appellee Du-More appearing at page 458 of the original Transcript of Proceedings in the District Court. This admission was inadvertently omitted from the parts of the record designated to be printed by appellants and is as follows:

“The Court: It is agreed that plaintiff here, that the George patent is the first one that put the cash register in that place?

Mr. Latta: In a checkstand?

Mr. Kriegel: No generally. I would agree in a check stand George was the first one that put a panel over a quadrant of the turntable.”

Counsel for appellants apologize for the oversight in not printing this portion of the record and call attention to the same now only in support of the admission of novelty appearing at page 240 of the printed record where both defense counsel admitted the novelty of the George checkstand with reference to the use of a turntable. It thus appears from the record that George was not only the first to put a turntable in a checkstand but was also first to put a panel for supporting a cash register over the turntable.

No. 15,855

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WM. T. ALVARADO SALES CO. and SPEE-DEE CHECKOUT
SYSTEMS, INC.,

Appellants,

vs.

SIDNEY S. RUBALOFF and ABRAHAM M. GROSS, indi-
vidually and doing business as CHECK-A-MATIC Co.,

Appellees.

WM. T. ALVARADO SALES CO., and SPEE-DEE CHECKOUT
SYSTEMS, INC.,

Appellants,

vs.

DU-MORE FIXTURE CO., INC.,

Appellee.

BRIEF FOR APPELLEE CHECK-A-MATIC.

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FILED

JUL 23 1958

PAUL P. O'BRIEN, CL

TOPICAL INDEX

	PAGE
Introductory and summary.....	1
The patent in suit is a narrow patent.....	4
The general arrangement of checkstand components is the same in the patent in suit as in the prior art.....	4
The placing of a turntable in a supermarket checkout counter is not the patented George invention.....	5
By appellant's own concession, the patent does not dominate the use of the turntable as a receiving conveyor in a supermarket check stand.....	6
File wrapper estoppel restricts the patent in suit.....	7
Restrictive features of claims in suit.....	7
The prior art discloses all essential components of the patented check stand	8
Operation of check stand of patent in suit is essentially the same as in the prior art.....	9
Allegedly novel results and advantages.....	10
The allegedly improved result of bringing articles close to the register is fully anticipated by Bradley.....	11
The alleged novel result is inconsequential.....	12
A checker can reach items on a belt conveyor without difficulty	12
Appellant's contention that because the discharge counter is conformed at its forward end to the circular shape of the receiving table, such constitutes novel coaction.....	15

The patent in suit is invalid as an unpatentable aggregation.....	17
Appellant's contention 12B—That there “is no evidence to support finding 8 that each claim is a nonpatentable aggregation, makes no improvement in the art and provides no (new) function or interaction of parts or novel and unexpected consequences”	17
The patent in suit does not represent invention over the prior art	19
The prior art is suggestive of the patented combination.....	19
The Florence patent suggests the substitution of a rotary turntable for Bradley's belt conveyor.....	22
Commercial success is not determinative of invention, regardless of whether the showing made by appellants is regarded as establishing commercial success or not.....	25
The accused Check-A-Matic check stands do not infringe.....	27
The FD-5 check stand clearly avoids infringement.....	27
The accused Check-A-Matic stands do not utilize a stop for articles on the turntable.....	28
The guide arm of the FD-5 is not a register support.....	30
Claim 3 is not infringed by the FD-5.....	31
Claim 5 of the George patent is not infringed by the FD-5. (Appellant's Chart VII).....	32
Claim 6 (Appellant's Chart VIII) is avoided by the FD-5.....	32
Claim 7 (Chart IX) is avoided by the FD-5.....	32
The Check-A-Matic model C-3 does not infringe the patent in suit	33
Claim 3 (Chart II) is avoided by the C-3.....	34
Claim 6 (Chart IV) is avoided by the C-3.....	34

	PAGE
Claim 7 (Chart V) is avoided by the C-3.....	34
The Check-A-Matic stands utilize a different concept of operation	34
File history refutes contention that George claims are broad enough to dominate the Check-A-Matic operation of re- directing	35
Claim 5 of the patent in suit is not infringed by the C-3. Claim 5 is restricted by file wrapper estoppel.....	36
Where the defendant's machine embodies an essential oper- ating part that operates on a different principle from the allegedly corresponding part of the patent in suit, such operating part cannot be regarded as the mechanical equiva- lent of the part in the patent.....	36
These cases hold that this rule applies even where the defen- dants' device or process falls within the literal term of the claims of the patent in suit.....	37
The C-2 stand.....	38
Conclusion	38

TABLE OF AUTHORITIES CITED

CASES	PAGE
Crampton Mfg. Co. v. Durable Products Company, 83 U. S. P. Q. 209.....	25
Goodman v. Supermold Corporation of California, 21 U. S. P. Q. 188	18
Goodman v. Supermold, 41 U. S. P. Q. 188.....	37
Great A. & P. Tea Co. v. Supermarket Equipment Corporation, 340 U. S. 147, 87 U. S. P. Q. 303.....	4, 18, 19
Kemart Corp. v. Printing Arts Research Laboratories, 96 U. S. P. Q. 159.....	36, 37
Kwikset Locks Inc. v. Hillgren, 100 U. S. P. Q. 289, 210 F. 2d 483	26
Lincoln Engineering Co. v. Stewart-Warner Corp., 303 U. S. 545, 37 U. S. P. Q. 1.....	18
Schick Service, Inc. et al. v. Jones, 173 F. 2d 969, cert. den. 70 S. Ct. 62, 338 U. S. 819.....	25
Schreyer v. Chicago Motocoil Corp., 48 U. S. P. Q. 618.....	26
Willamette-Hyster Co. v. Pacific Car and Foundry Co., 50 U. S. P. Q. 422.....	18
Wire Tie Machinery Company et al. v. Pacific Box Corporation, Ltd., 43 U. S. P. Q. 128.....	36, 37

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DU-MORE FIXTURE CO., INC.,

Appellee.

BRIEF FOR APPELLEE CHECK-A-MATIC.

Introductory and Summary.

This defendant concurs in appellant's statement of Jurisdiction and Statement of the Case, with the exception of the final paragraph of the latter. The facts of record adequately support the finding of invalidity, and, in addition, will fully support a finding of non-infringement.

The District Court has found that the George patent for a grocery store check stand embodying a support for a cash register, a turntable type conveyor for moving a customer's purchases up alongside the register, and a discharge counter onto which the purchases are moved after being checked, is an unpatentable aggregation of components the functions of which are not different from the functions of such components as disclosed in the prior art; that there is no new relationship, coaction or surprising result in such aggregation; and that the alleged invention, as it differs from the prior art, was obvious to a person of ordinary skill in the art; and has concluded that the four claims sued upon, are invalid for lack of invention.

It will be shown that the alleged errors do not exist.

Numerous errors and fallacies do exist in appellant's argument, and will be pointed out herein in due course. It will be shown that while George may have been the first to utilize the well known turntable type conveyor for food articles, for conveying such articles alongside a cash register in a grocery store check stand, such use of the turntable conveyor was never recognized as an invention by the U. S. Patent Office, and the patent in suit does not embrace all check stands utilizing a turntable for conveying grocery articles to the side of a cash register for checking and transfer to a discharge counter, but is restricted to specific features of *arrangement* such as (a) the register support (or some means) being arranged so as to form a *stop* for articles on the turntable; and (b) the discharge counter being arranged to extend *as a continuation* from the periphery of the turntable.

The following additional points are developed in this brief:

Briefly, the accused Check-A-Matic stands each comprises a register support, a turntable type conveyor for moving articles along the left side of the support, a discharge throat, an article guide for deflecting the turntable-borne articles into the throat, and a bagging counter on which the articles are placed after being checked.

In each of the check stands made and sold by the defendant Check-A-Matic, infringement is avoided by the omission of one or more of the above noted restrictive features of arrangement in the patent in suit; in each instance the discharge counter is located at a substantial distance from the turntable and does not extend as a continuation from its periphery; in neither the FD-5 or the C-3 check stand, is there any means to stop articles on the turntable, but instead, a guide which allows continued movement of the articles while redirecting them to a discharge throat beyond the periphery of the turntable, following the teaching of the prior art; and in the FD-5 check stand the register support is arranged outside the periphery of the turntable and is not positioned over the turntable.

The alleged invention, which appellant (ignoring the restrictions referred to above) now urges is covered by the patent, in substance would be no more than the simple substitution of one type of article conveyor for another type of motor driven, switch controlled conveyor for advancing a customer's purchases alongside a cash register in a grocery store check stand having a discharge counter on which the articles can be sacked after they have been checked. Such a substitution did not require

the exercise of invention over the prior art, which disclosed (a) that the concept of using a motor driven turntable for moving groceries up to a check-out station in a grocery store, was an old one, and (b) that the particular type of turntable and guide arm for deflecting food items outwardly from a circular path off the turntable and onto a discharge surface, is an old concept in the food packaging industry prior to the George invention.

The discharge counter of the patent in suit bears the same relation to the turntable conveyor as that existing between the discharge counter and the belt type conveyor of the prior art checkstands, and therefore, under the ruling of the United States Supreme Court in the *A. & P.* case hereinafter referred to, the patent is invalid for over-claiming the alleged invention, *i.e.*, in again claiming the discharge counter in combination with the motor driven conveyor and register support, which George had no right to do.

The Patent in Suit Is a Narrow Patent.

The General Arrangement of Checkstand Components Is the Same in the Patent in Suit as in the Prior Art.

The chief components of a modern check stand are: (a) a support for a cash register; (b) a motor driven conveyor onto which purchased items can be unloaded and by which the items are transported alongside the cash register (the left side of the register as it is faced by the checker) where the checker can grasp the items with the left hand, register the price with the right hand, and move the items rearwardly to (c) a discharge counter (sacking counter) extending rearwardly from the discharge end of the conveyor.

This general arrangement exists not only in the patent in suit and in the allegedly infringing Check-A-Matic and Du-More check stands; it also exists in the early Check-A-Matic check stand [Check-A-Matic Ex. D, R. 301] which appellants have admitted does not infringe the patent in suit, and it also exists in the belt type check stands as illustrated in the Bradley patent No. 2,317,438 and in Du-More Exhibit C [R. 404].

The Bradley patent discloses in Figures 10 and 11, a modification of the check stand shown in his Figure 1. By relating the fragmentary showing in Figure 10 to Figure 1 and to the Bradley specifications (column 2, page 3, line 58 through line 39, column 1, page 4) there is disclosed a check stand as illustrated in Check-A-Matic Exhibit E-4 [R. 311] which embodies a switch controlled, motor driven endless belt conveyor arranged to move groceries from a loading point at its forward end, alongside a register support to a checking point adjacent the left side of the register as faced by the checker, together with a discharge counter onto which the checker transfers the articles after checking.

The Placing of a Turntable in a Super Market Checkout Counter Is Not the Patented George Invention.

Alleged error No. 1: that the Court failed to recognize and take into account the admitted novelty of the patented device.

Appellants place great emphasis upon the fact that the patentee George was the first to use a turntable in a check stand for self service stores. But this is not the George patented invention, and the contention that the trial court failed to recognize and account for this fact

is without foundation. On the contrary, at the end of the trial, the Court himself raised this point [R. 240].

“The Court: I assume, and I don’t think there is any controversy, that the plaintiff here is the first one that used a turntable in a checkout counter.” (to which counsel agreed).

Clearly this point was firmly fixed in the mind of the Court and considered and taken into account in reaching the decision appealed from.

By Appellant’s Own Concession, the Patent Does Not Dominate the Use of the Turntable as a Receiving Conveyor in a Supermarket Check Stand.

Appellant’s counsel, in a letter written September 29, 1953, to local counsel Fred H. Miller [Check-A-Matic Ex. B—R. 304] stated in part:

“I am in agreement with Mr. Latta that the structure disclosed in the Check-O-Matic circular does not infringe the George patent.”

It has been stipulated [R. 39] that Check-A-Matic Exhibit D [R. 307, 308] is a copy of the circular referred to in the letter Exhibit B.

Referring to the cut shown in the lower right hand corner of the second page of Exhibit D, this early Check-A-Matic stand had a turntable receiving counter, a register stand of approximately the same shape as the FD-5 stand, in the same position, a bar switch for stopping rotation of the turntable (which also corresponds broadly to the guide arm of the FD-5) a discharge throat (labelled “Accuracy bridge” in the cut) extending from substantially the same point as the discharge throat of the accused Check-A-Matic stands but for a greater distance, and

finally, a revolving sacking table, corresponding broadly to the sacking counter of the accused stands. Thus the essential elements of the type of check stand involved in this litigation are present in the stand which appellants have admitted is not an infringement, namely, the turntable conveyor, the register support panel beneath which the conveyor revolves, the guide arm, the discharge throat and the packing table.

Clearly, by the appellant's own admission, the placing of a turntable in a checkout stand is not the patented George invention, *i.e.*, is not broadly dominated by the patent.

File Wrapper Estoppel Restricts the Patent in Suit.

By file wrapper estoppel, appellant is estopped to contend that the patent in suit broadly dominates the broad combination of turntable receiving counter, register stand disposed above a quadrant of the turntable, and discharge counter. A claim for this combination was rejected by the Patent Office on the ground that it did not represent an invention over the Bradley, Price and Wilcox patents, and this claim was surrendered by George in favor of one of the restricted claims of the patent. This matter is dealt with more in detail herein in the section dealing with the question of infringement.

Restrictive Features of Claims in Suit.

In addition to the three main components referred to above, the patented check stand embodies (d) a stop (recess 29 in left margin of register support panel) for stopping articles on the turntable; (e) conformity of the forward end of the discharge counter to the periphery of the turntable; (f) extension of the discharge counter as a continuation of the turntable; (g) the inner edge of

the turntable being concavely arcuate with respect to the support panel; (h) a guard ring around the exposed edge of the turntable and extending inwardly over the outer edge of the discharge counter to direct items toward the stop; (i) an electric motor for driving the turntable; and (j) a control (switch) for the motor.

Features (d), (e) and (f) constitute material limitations in the claims of the patent in suit. They can not be ignored.

The Prior Art Discloses All Essential Components of the Patented Check Stand.

Alleged error 12A—that there is no evidence to support finding 7 that each of the individual components of the claimed invention were well known in the prior art.

This contention can be quickly answered. The evidence includes the prior patents included in Du-More Exhibit C, attention being called particularly to the following patents disclosing the components indicated. Since these patents are discussed in detail elsewhere in this Brief, they are commented on only briefly at this point:

Bradley 2,317,438—the general combination and arrangement of essential components including the conveyor, a drive motor, a control therefor, a register support, a stop and a discharge or sacking table.

Price 2,268,897 [R. 391]—showing the combination of turntable conveyor 50, discharge throat 58, and generally radial guide arm 59 for guiding packaged food items off the turntable onto the discharge throat after moving arcuately around the turntable from a loading inlet 57. According to appellant's contentions as to the guide parts of the accused Check-A-Matic stands (which appellees dispute), the Price guide arm 59 would constitute a

“stop”, since, instead of allowing the articles to rotate repeatedly around the table, it directs them off the table into the discharge throat 58.

Florence 1,400,948 [R. 352]—disclosing *the use of a turntable 12 in a self service store* for conveying groceries from a loading point in the back of the store to several checkout points (arcuate tables 6) where a customer may pick up items from the turntable, place them in a basket and carry them to an adjacent cashier’s desk 35 for checking and payment.

Tench 765,298 [R. 325], disclosing a turntable conveyor A and a discharge throat D’ conformed to the arcuate periphery of the turntable.

Muse 2,237,080 [R. 387] disclosing the general combination of receiving conveyor 7, register support surface 21 at the right side thereof, and sacking counter 5 extending rearwardly from the discharge end of the conveyor and having a margin 19 that is curved arcuately rearwardly and laterally, similarly to the sacking counters of the accused Check-A-Matic stands.

Clearly, there is ample evidence supporting finding 7, and this contention of error has no merit.

Operation of Check Stand of Patent in Suit Is Essentially the Same as in the Prior Art.

Alleged error No. 4—that the Court failed to take into account the admitted utility and *allegedly improved action* of the patented device.

Appellees do not deny that the check stand is useful. As to allegedly improved action, however, the operation described on page 12 of Appellant’s Brief is as applicable to the prior art belt type check stand as to the turntable type stands.

In the use of the Bradley stand, for example, the customer approaches a loading position at the front end of the check stand, and an attendant places his articles on the conveyor on the side of the belt which will pass close to the register (note the loading position 11 on the register side of the conveyor, and the description in lines 21-24, col. 1, page 4 of Bradley, relating to his Figures 10, 11). The checker, actuating a control to operate an electric motor which drives the conveyor, causes the articles to be moved by the conveyor to the left side of the register. The customer may place additional articles on the conveyor at the loading position in the area left vacant by movement of the articles toward the register. The checker may pick up the articles while moving alongside the register, or, if congestion occurs, may stop the movement of the conveyor or may allow the articles to be arrested by a stop at the rear end of the belt. In each instance the articles are presented within easy reach near the cash register, are checked by the checker, using his right hand to operate the register, and are moved by the checker, using his left hand, rearwardly to the sacking or "discharge" counter.

The foregoing description of operation, as applied to the Bradley check stand, uses, in essence, appellant's own words employed in describing the operation of the check stand of the patent in suit.

Allegedly Novel Results and Advantages.

Alleged error No. 5—that the trial court failed to take into account the fact that the overall result or function of the patented device is more than the sum of the functions of its several parts, etc.

The following comparison of the similar results obtained in the patented and Bradley check stands clearly shows that this contention of error is without merit.

The Allegedly Improved Result of Bringing Articles Close to the Register Is Fully Anticipated by Bradley.

Appellants, by reference to Plaintiff's Exhibit 8 [R. 261] emphasize the alleged novelty and improved result in the operation of the turntable in bringing the customer's purchases to a point closely alongside the cash register. It is contended that the customer will tend to place his purchases on that side of the conveyor which is nearest to him, that such articles traveling on the belt type conveyor will go outside the normal line of vision, and that it would be easier for the checker to get at the articles if they were traveling on the inside of the belt.

But this is exactly what is disclosed in the Bradley patent, which teaches the unloading of the customer purchases from the shopper's cart onto the receiving table at the unloading station 11 *which is on the inner side of the belt*, so that the articles as thus deposited on the nearer side of the belt will move in a path *closely adjacent the register*, exactly to the point which appellant has emphasized as being the point of easiest reach for the checker, and fully within the range of the checker's vision.

The Bradley patent completely refutes the contention that the turntable of the patent in suit will attain an improved result in bringing the customer's articles more fully within the checker's vision or more convenient to the checker's reach.

The Alleged Novel Result Is Inconsequential.

In any event, the allegedly improved and novel result of bringing the articles closely adjacent the cash register is inconsequential, for the following reasons:

It is common practice for checkers to reach for articles on the turntable before they arrive at a point of maximum closeness to the register. The witness Sellers, who had observed the operation of turntable check stands, in response to the question of where the checker usually picks up a package, replied [R. 198].

“A. Well, that depends on a number of things, how many articles are upon the turntable and their size, but it has been my observation that in the usual event the articles are not too concentrated, and she tends to take them from the turntable before they reach a stop position * * *”.

The plaintiff's witness, Mrs. Kenney, demonstrating a check stand before the Court, reached for articles on the turntable and testified that this was her habit [R. 60].

“Q. You had to reach a substantial distance across the turntable to pick that up. A. That is my habit. I check that way.”

A Checker Can Reach Items on a Belt Conveyor Without Difficulty.

Plaintiff's witness McNeil admitted that the checker can reach articles on a belt conveyor [R. 104] and that the majority of belt conveyors do not exceed 18 inches in width [R. 109]. Plaintiff's witness Alvarado testified (with respect to a checkstand utilizing a belt conveyor in its discharge counter) that in operating this check stand the checker would remove articles from the turntable, weigh them and then slide them across 26 inches to the discharge counter belt [R. 97, 98].

If a checker can reach a belt 26 inches away, she will have no difficulty reaching items on a belt 18 inches in width. Clearly, it is inconsequential, from the standpoint of the ability of the checker to reach the articles approaching her on the conveyor, whether the conveyor is of the turntable type or the linear belt type.

As to the alleged advantage of having the approaching articles on the conveyor clearly within the checker's view, even though we assume that the checker holds her head rigidly in a fixed position with her line of vision substantially as indicated in Plaintiff's Exhibit 8, it is apparent that the articles, reaching a position approximately opposite the center of the cash register where the checker customarily reaches to pick them up, will still be within the full range of vision of the checker substantially as fully in the case of the belt type conveyor as in the case of the turntable. But obviously, the checker will not maintain her head in a rigid position. Plaintiff's witness Kenney [R. 59] testified:

"Q. You don't look directly in front of you, you don't face head on into the cash register at all times. You were looking off to your left, isn't that correct?

A. You have to look both places when you are checking."

Alleged error No. 3—that the trial court failed to take into account the alleged uncontroverted evidence of novel coercion between the elements of the patented device.

The foregoing comparison of operation of the George and Bradley check stands indicates that the coercion between the elements of the patented device is essentially the same as that existing in the prior art. To fully answer the appellant's contention however, the various as-

sertions on pages 13 and 14 of Appellant's Brief will be tested against the prior art:

The Bradley conveyor belt functions to receive articles at a point remote from the checker, and to advance the articles to the same convenient checking position directly alongside the register, and then travels under itself to the front of the stand to receive additional articles.

The Bradley register panel supports the register at the right side of the active conveying area of the belt (as the support panel of the patent in suit supports the register at the right side of the active conveying area of the turntable) with the rear edge of the register close to the rearmost part of the conveyor belt so that the checker can stand within easy arm's reach of articles advanced to the stop by the conveyor belt. As admitted by appellant, the use of the left edge of the register to function as the stop, is not required, and a separate stop plate 83' of Bradley's Figure 10, actually is mounted across the conveyor belt at its rear end (the corresponding part in Bradley's Figure 2, "ramp 32" is described as having a stop function).

The discharge counter 9 of Bradley performs the function of receiving articles advanced thereto, and coacts with the conveyor belt by being conformed at its forward end to the straight transverse shape of the rear end of the active conveying area of the belt.

Bradley's discharge counter coacts with the register support panel to the same extent as in the patent in suit, by being positioned closely adjacent the rear corner of the register panel sufficiently to be within the normal swinging arm's reach of the checker while moving checked items rearwardly, and so that there is a con-

tinuous supporting surface from the stop to the discharge counter. If the checker chooses to do so, the articles can be pushed or swept from the checking position onto the discharge counter over the plate 83' of Figure 10 with essentially the same ease that articles can be transferred over the scale platform of any of the accused check stands.

The plate 83' of Bradley's Figure 10 will function essentially as a stop (to the same extent as there is a stop function in the *discharge throat* of the accused Check-A-Matic check stands) since any article pushed off the conveyor belt onto the plate 83' will stop its rearward travel. Articles with flat bottoms and sharp corners would be stopped by the edge of the plate 83'. This stop coacts with all three of the other components, namely the conveyor, the register support and the discharge counter in that its position is such as to interrupt the advancing motion of the articles close to the side of the cash register and immediately adjacent the discharge counter. When located near or against the stop, all articles are in easy reach of the checker and can be easily viewed by turning her head sideways.

Any difference between the coaction of parts in the patent in suit and in the Bradley check stand is inconsequential and of no patentable importance.

Appellant's Contention That Because the Discharge Counter Is Conformed at Its Forward End to the Circular Shape of the Receiving Table, Such Constitutes Novel Coaction.

The patent in suit discloses, in the counter 5, a surface which *extends continuously from* the surface of turntable 6. The patent advances the theory that this makes it possible for the checker to slide articles off the turn-

table and to the rear end of the counter 5 by a continuous arcuate sweeping movement of the left arm, pivoting around a vertical axis. Actually, this continuous arcuate sweeping sliding movement is not normally practiced in the operation of modern check stands. In all of the accused Check-A-Matic stands (as well as in stands made by others including appellee Du-More and appellant Speed-Dee) a gap wide enough to receive a weighing scale intervenes between the discharge area of the turntable and the sacking counter, and as has been pointed out, it is customary practice for the checker to pick up the articles, check them and place them on the weighing scale or on the sacking counter depending on whether weighing is required.

The small area outlet throat in the accused Check-A-Matic stands, which (rather than the large rectangular counter which actually receives the checked articles) appellant labels "discharge counter" in each of the charts shown on pages II through IX of appellant's Appendix to Brief, is simply the well known outlet throat of a conventional turntable conveyor as disclosed at 58 in Price patent No. 2,268,897, at 60 in the Wilcox patent No. 1,664,055, at 3 in the Hildenbrand patent No. 1,090,713, and at D' in the Tench patent. Tench discloses full conformity of the discharge throat surface to the arcuate contour of the turntable (note Fig. 2).

Insofar as the discharge throat is concerned, if it be regarded as corresponding to the patented discharge counter (which it does not) the coaction between the rotating turntable and the discharge throat is precisely the same as in the Tench patent, the Price patent, and the others noted.

Alleged error 12C—that there is no evidence to support finding 9 that the functions of the components of the invention are no different from those of the prior art and that there is no new relationship and coaction between the components.

It is clear from the foregoing that there is no merit to the appellant's contention, and that this finding is amply supported by the evidence.

The Patent in Suit Is Invalid as an Unpatentable Aggregation.

Appellant's Contention 12B—That There "Is No Evidence to Support Finding 8 That Each Claim Is a Non-patentable Aggregation, Makes No Improvement in the Art and Provides No (New) Function or Interaction of Parts or Novel and Unexpected Consequences."

From the foregoing comparison of operation of the patented and prior art check stands, it is apparent that there is no novel coaction whatever between the conveyor and register support portions of the patented check stand and the discharge or sacking counter thereof. The coaction between these sections of the check stand is in each instance exactly the same. The sacking counter is located directly behind the delivery area of the conveyor and to the rear of the checker's position, in a convenient position for rearward transfer of the checked articles. Beyond that, there is no coaction.

The discharge counter of the patent in suit performs exactly the same function as the sacking counter of the Bradley, Turnham and Muse patents. The register stand, in its relationship to the discharge counter, performs exactly the same function in each instance, *i.e.*, it supports a register at the right side of the operative conveyor

area. The conveyor of the Bradley patent performs the same function in relation to the register stand and sacking counter as does the turntable conveyor of the George patent, *i.e.*, it conveys grocery articles from a loading point at the forward end of the check stand alongside the left side of the register to an area within easy reach of the checker so that the checker may grasp the articles in the left hand, register them with the right hand, and then transfer them rearwardly onto the sacking counter. The stop in the Bradley patent performs essentially the same function as the stop formed in the left margin of the register stand of the patent in suit. In the event of congestion, it will arrest the conveyor-borne movement of the articles before they pass beyond the checker's reach.

Under these circumstances, the patentee George had no right to claim the discharge counter in combination with the conveyor and register support, thereby arming himself with the means to levy tribute upon the manufacture and sale of the well known sacking counter. The claims in suit are therefore clearly invalid as unpatentable aggregations under the well established decisions of this Court and other Courts including the United States Supreme Court, in the following cases:

Goodman v. Supermold Corporation of California
(C. A. 9, 1939), 21 U. S. P. Q. 188;

Willamette-Hyster Co. v. Pacific Car and Foundry Co. (C. A. 9), 50 U. S. P. Q. 422;

Great A. & P. Tea Co. v. Supermarket Equipment Corporation (U. S. S. Ct.), 340 U. S. 147, 87 U. S. P. Q. 303;

Lincoln Engineering Co. v. Stewart-Warner Corp.
(U. S. S. Ct., 1938), 303 U. S. 545, 37 U. S. P. Q. 1; and many other cases.

Paraphrasing the words of the United States Supreme Court in the *A. & P.* case, in which the Turnham patent was held invalid, the words of the Court, as paraphrased, apply precisely to the present situation, as follows:

“This (discharge or sacking) counter does what a store counter always has done—it supports merchandise at a convenient height while the (sacker places the merchandise in sacks and) the customer makes his purchases and the merchant his sales. The (rotary conveyor) will draw or push goods (upon) it from one place to another, just what any such (conveyor) would do . . . and the guide rail keeps it from falling or sliding off from the (conveyor), as guide rails have ever done. Two and two have been added together, and still they make only four.” (Parenthetical material added).

The Court’s finding 12B that the claims in suit are non-patentable aggregations, is eminently correct in this case and should not be disturbed.

For further discussion of the law relating to aggregation and over-claiming, reference is made to the Brief of the appellee Du-More in this Appeal.

The Patent in Suit Does Not Represent Invention Over the Prior Art.

The Prior Art Is Suggestive of the Patented Combination.

Alleged error No. 2—that the trial court failed to take into account the alleged admitted insufficiency of the prior art to teach or suggest the combination of elements in the patented device.

Appellants, at pages 21 through 23 of their Brief, stress several points in the testimony of appellee’s expert, including:

(a) That where an article is advanced alongside *and past* the cash register, it would not be stopped. This was in reply to a hypothetical question, and out of context, insofar as any application to the Bradley patent is concerned. Obviously, articles are stopped at the end of the active stretch of the conveyor belt of Bradley, and this testimony does not in any manner constitute an admission that the stopping of articles in the general vicinity of the cash register is novel.

(b) The question of whether the Price patent *in itself* suggests the substitution of a rotatable turntable to the belt type or straight counter type check stand as shown in other patents. This question is not determinative of the issue of lack of invention. Although the witness Sellers did not state that he found such a suggestion in the Price patent, or any suggestion of requirement that the articles conveyed be checked or recorded, he did testify that the turntable of Price could be incorporated in the check stands of the Bradley and Turnham patents [R. 180, 181, 189]. And he testified that in the Bradley patent itself is contained the suggestion of the substitution of an industrial type conveyor for the type shown in the Turnham patent [R. 192, 193]; and that in making the substitution of a turntable for the conveyor of Hughes, Bradley or Turnham, that "I would substitute one type of loading area for another" [R. 174]; and that in the prior art there are a number of turntables that are adapted to be incorporated (in the check stands of the prior art) [R. 165, 174].

Within the single disclosure of the Bradley patent there is contained the suggestion of the equivalency of different types of conveyors, including the roller mounted tray

running on tracks (Fig. 2) the industrial roller type conveyor (Fig. 7) and the endless belt type conveyor (Fig. 10) for conveying grocery articles from a loading point alongside a cash register. This teaching in Bradley constitutes, in effect, a teaching that any known conveyor can be utilized in a check stand with its active conveying area extending past the left side of the register. The roller type industrial conveyor of Bradley's Figure 7 and the rotary turntable conveyor of the Price patent are directly in the same class of prior art, and it is a perfectly obvious concept to utilize the Price turntable, from the industrial art of loading food packages in a packing house in lieu of the equally industrial type conveyor shown in Figure 7 of the Bradley patent.

The endless belt type conveyor, as disclosed in the Bradley patent, and the turntable type conveyor, as disclosed in the Price patent, are closely analogous devices. The belt conveyor has an upper stretch which, in the Bradley check stand, moves toward the register and past the left side thereof, and is operative for conveying articles alongside the register. It has a lower stretch which executes a return movement and is inoperative, *i.e.* not utilized for conveying articles.

The well known turntable conveyor likewise has an endless conveying area which, instead of bending around spaced rollers, as in the case of the belt conveyor, bends in an arc around the vertical axis of rotation of the turntable. As in the case of the endless belt conveyor, it has an operative area (mainly on its left side as disclosed in the Price patent) functioning to transport food packages from a remote loading point to a discharge throat 58; and it has an inoperative area (lower right quadrant as viewed in Price's Fig. 1) which passes beneath a guide

arm 59 and beneath other guide parts 65, 66 to return to the loading point. Similarly, in the turntable check stands, the conveyor area has a leftward portion moving toward the checker past the left side of the register from a remote loading point, and an inoperative area (forward right quadrant), which passes beneath other portions of the apparatus (*e.g.* the guide arm in the defendant's FD-5 check stand and returns to the loading point).

The concept of arranging the conveyor so that its inoperative area passes *beneath other parts* of the apparatus in returning to the loading point, is disclosed in the Bradley patent and again in the Price patent. It is obviously a common concept.

The Florence Patent Suggests the Substitution of a Rotary Turntable for Bradley's Belt Conveyor.

It is not even necessary to go outside the self-service store to find this suggestion. The Florence patent suggests the use of a turntable for conveying articles from a loading area of a store to a checkout area where a customer intercepts the articles on the turntable, places them in her basket and carries them to an adjacent cashier's desk. Thus the concept of using a turntable to convey groceries from a loading point to a checkout point is clearly disclosed.

The Florence patent was not cited by the Examiner against the patent in suit. Accordingly, there is no presumption of validity of the patent in suit with respect to the Florence patent.

With respect to the Florence patent appellants argue (App. Br. p. 21) that to interpose a checking device over a Florence table 17 would defeat its purpose, as it would sweep all articles off the table as they were advanced to

the side of such checking device, and concludes that such table would then become useless.

This conclusion is obviously unsound, since *the very purpose of the* guide member of the accused Check-A-Matic check stands is identically that which appellants contend would render the turntable useless, namely, to sweep all articles (except those already picked up by the checker) off the turntable into the discharge throat of the apparatus.

Alleged error No. 7—that the trial court failed to recognize the allegedly admitted fact that appellee's cited prior art did not show anything different from that considered by the Patent Office before allowing the patent.

The record directly contradicts appellant's contention in this respect. Defendant's expert Sellers, after discussing the prior patents to Bradley and Muse and Turnham (not cited by the Patent Examiner) when asked if there were any other patents of record relating to checkout stands, mentioned the Goodrich patent No. 1,071,004 [R. 334] "which could have been incorporated into a checkstand" [R. 164]; dwelt at length upon the Florence patent [R. 165, 166, 167] and then stated that the Turnham patent does show something in addition to Bradley [R. 169].

Since it is a fact that there is additional disclosure in uncited art, the allegation of error No. 7 clearly has no merit.

Alleged error No. 12D—that there is no evidence to support finding No. 10 that the difference between the invention and the prior art was obvious to persons having ordinary skill in the art.

Appellant heavily stresses the alleged failure of the prior art to suggest the location of a turntable with a sector thereof disposed beneath the register stand (App. Br. p. 38) and that all prior check stands have continuous supports that obstruct and prevent the positioning of a turntable partially underneath them, and therefore cannot suggest the positioning of a turntable partially underneath them.

It seems too clear to require argument, that if a skilled mechanic undertook to substitute the Price turntable type of conveyor for the endless belt conveyor of Bradley, that the logical location for the turntable would be in the position shown in Check-A-Matic Exhibit E-5, with its operative area (left half) lined up with the discharge counter; and that certainly it would not require any invention on the part of any mechanic or carpenter to cut a slot in the Bradley check stand beneath the register support in order to receive a sector of the turntable, notwithstanding the lack of any specific disclosure of such a slot in the references.

The Examiner in the Patent Office repeatedly held that the matter of substituting a rotary type conveyor for the Bradley conveyor was not an invention, and in his second rejection, he rejected *all* of claims 1 to 20 on Bradley and Price, as follows:

“Claims 1 to 20 are further rejected as being unpatentable over Bradley taken with Wilcox and Price. * * * it is held that no invention would be involved in replacing the conveyor of Bradley by a rotary turntable type of conveyor, suggested by Wilcox and Price”.

Alleged error No. 9—that the trial court failed to recognize and consider the uncontroverted evidence of commercial success of the patent in suit and the tribute paid to the invention by defendant appellees in copying the device of the patent.

**Commercial Success Is Not Determinative of Invention,
Regardless of Whether the Showing Made by Appellants
Is Regarded as Establishing Commercial Success or Not.**

Commercial success will not validate an invalid patent.

Schick Service, Inc. et al. v. Jones (C. A. 9, March. 18, 1949), 173 F. 2d 969; cert. den. 70 S. Ct. 62, 338 U. S. 819.

Nor will commercial success enlarge the range of equivalents to which a patentee may be entitled.

Crampton Mfg. Co. v. Durable Products Company (D. C. W. D. Mich.), 83 U. S. P. Q. 209.

As to the alleged copying of the invention by defendant-appellees, it is submitted that there has not been any copying of the invention, as will be pointed out in the section of this Brief dealing with non-infringement.

There is no indication that the trial court failed to consider the evidence on commercial success and the evidence relating to alleged infringement.

Alleged error No. 10—that the trial court failed to consider that the patent in suit is presumed to be valid.

The presumption of validity cannot prevail over the anticipatory disclosure of references not cited by the Examiner (*e.g.* the important Florence disclosure of the use of a turntable for checking out groceries) nor can it save a clearly invalid patent regardless of lack of new evidence of invalidity.

(*Kwikset Locks Inc. v. Hillgren* (C. A. 9, 1954), 100 U. S. P. Q. 289, 210 F. 2d 483; *Schreyer v. Chicago Motocoil Corp.* (C. C. A. 7), 48 U. S. P. Q. 618.) This is especially applicable to the defense of invalidity for aggregation. Clearly, there is no basis for the contention that the trial court failed to consider this presumption.

Alleged error No. 11—that the trial court failed to consider that the problem solved by the patent in suit had long been recognized by the trade and that in spite of this no one prior to the patentee had been able to conceive or devise the simple solution thereof as disclosed by the patentee.

It is respectfully submitted in this connection that the patent in suit did not solve any pressing problem, since the prior belt type check stand is still in common use as shown by the evidence of the Du-More belt type commercial check stand and as is apparent in countless supermarkets using the belt type stand. Furthermore, the simple solution of the problem of speeding up grocery checking *was solved* by the general combination of motor driven, switch controlled belt conveyor, register stand and discharge counter exemplified in such belt type check-out stands and shown in the prior Bradley patent. It is Bradley and Turnham who should receive the credit for the advance in the art of checking groceries, rather than the patentee George.

The Accused Check-A-Matic Check Stands Do Not Infringe.

Alleged error No. 8—that the trial court failed to take into account the alleged fact that the accused devices each included all of the elements defined by one or more claims of the patent in suit.

This contention is unsound for the reason that the accused devices do not include all elements of any claim.

The FD-5 Check Stand Clearly Avoids Infringement.

Briefly describing this check stand, referring to Check-A-Matic Exhibit "C" [R. 305] it comprises a turntable conveyor 3 the periphery of which rotates immediately adjacent the concave arcuate forward margin of a register support panel of generally triangular shape disposed outside the periphery of the turntable. This register panel is colored blue in the original Exhibit C attached to interrogatories and appears in dark shading in the copy of the Exhibits bound into the record. A merchandise guide arm 17 extends from a point immediately beneath the leftward corner of the register panel (as faced by the checker) to the center of the turntable on an angle diverging with reference to the right side of the register panel. At the center of the turntable, defining the inner margin of the conveying area [R. 224]. The arm is of substantial width, so that this rounded end is of substantial circumference, and so that the groceries will not pile up in back of the arm [R. 223].

The guiding edge of the arm 17 is disposed approximately four inches off center (leftward of a radius of the turntable extending down the center of the arm) [R. 224].

Leftward of the rear end of guide arm 17 is an outlet throat 2.

A bagging platform or counter 14, 15 is located rearwardly of the throat 2, being spaced therefrom by a space 1 of sufficient area to receive a weighing scale which is not sold as a part of the check stand. A hip switch 11 operates an electric motor for rotating the turntable 3.

The throat 2 does not correspond to the "discharge counter" of the patent in suit. Obviously, it is not a counter, but simply an outlet through which articles can be delivered from the turntable the same as in the throat 58 of the Bradley patent. Any article stopping on the throat 2 will be picked up by the checker and transferred on to the counter 15.

The Accused Check-A-Matic Stands Do Not Utilize a Stop for Articles on the Turntable.

The articles borne by the turntable are redirected and driven onto discharge throat 2 by the turntable in the event they are allowed to engage the guide margin of the guide arm 17. This is what occurs in the operation of the Check-A-Matic stands as admitted by plaintiff's witness Kenney [R. 61, reading as follows]:

"Q. (by Mr. Latta): Mrs. Kenney, I noticed in the operation of this check stand where there were a number of articles in a group, some of these articles came up against the side of the register support panel here and as the turntable continued to rotate, these articles were feeding towards you along the edge of the panel. That did actually happen in this demonstration of yours, did it not? A. I imagine it did.

Q. Isn't that a customary operation in this type of checkstand for the articles to feed along the side

of the register as the turntable revolves? A. Yes, it is, with a good load."

The witness Sellers explained in detail how the articles, moving in a circular path on the turntable, will meet a loading edge of the guide member with an angle of approach less than 90° , as indicated by the straight arrow in Check-A-Matic Exhibit E-7 [R. 314], the magnitude of this angle of approach being indicated by the short arcuate double headed arrow [R. 199], results in the movement of the articles being redirected out to the discharge throat, and thus there is a basic difference between the operation of the Check-A-Matic stand and the stand of the George Patent in suit [R. 200, 222, reading as follows]:

"A. Yes, it is that difference in the angle and in the slope of the guide * * * which brings about a difference in results. In George, the result is the stopping of the movement of the article, whereas in the Check-A-Matic construction, the movement is merely redirected.

Q. What is the operation of the check stand in each of these instances as an article is rotated by the turntable and contacts the guiding edge, which we see here in the model C-3 as the left edge of the support panel for the register? A. Well, as the table rotates and it hits the guide arm, the merchandise comes down through the throat to the checker.

Q. Is it driven into the throat by the rotation of the turntable? A. The combination of the rotation of the turntable and the angle of the guide.

Q. Do you also find that operation and the corresponding guide member in the FD-5? A. Yes."

The Guide Arm of the FD-5 Is Not a Register Support.

The register support panel is at a higher level than the guide arm 17, and while the panel at its leftward corner is supported upon the rear end of the guide arm, the cash register, shown in broken lines in the lower figure of Exhibit C, extends out into midair over the guide arm and the turntable and engages only the supporting panel. The projecting area of the register bottom is only approximately 25% thereof and between 60% and 85% of the bottom of the register is in supported contact with the support panel when the register is properly installed with its right rear corner filling the right rear corner of the support panel (which is the position that the Check-A-Matic Company designates to the purchaser) [R. 224, 225].

The register is thus solidly supported against tipping [R. 204, 205].

Even when the supported area is only 60%, the register is stably supported [R. 226].

Appellants have gone to great length in developing a record to show that store owners upon occasion insert blocks of wood etc., beneath the forward corner of the register and the guide arm in order to add support for the register. This has occurred through the individual initiative of store owners who for some reason may prefer to move the register as much as five inches leftward from its proper position lined up with the right margin of the support panel, and in some cases moving the register to that extent both leftward and rearwardly (toward the front of the check stand). It is thus obviously possible to so reduce the supported area as to leave the register in an unstable, tilting condition on the panel. But the

instructions of the Check-A-Matic Company are to place the register with the right rear corner filling the right rear corner of the panel [R. 224]; and it is never suggested to a market owner that he block up the inner corner of the register [R. 225]. In contrast to the two isolated instances shown by appellant, the witness Thompson, in charge of sales in the San Francisco area, had the registers in all of his check stands in that area installed properly and had not seen any of them moved [R. 225].

No instance of displacing the register was shown to have occurred elsewhere (than Corona Del Mar and Carlsbad) either in Los Angeles County or in Northern California although the witness Alvarado testified [R. 71] that he had seen Check-A-Matic stands with the registers properly aligned with the right and front panel margins; and had looked at very many Check-A-Matic stands in Los Angeles County. There is no evidence in the record that any Check-A-Matic official ever suggested or acquiesced in any such displacement and blocking practice.

Claim 3 Is Not Infringed by the FD-5.

Referring now to appellant's chart (page VI of Appendix to App. Br.), which, it is said, illustrates the alleged infringement of claim 3, and using appellant's reference letters thereon, infringement is avoided in the following particulars:

A. The register support panel does not have a stop portion along one edge thereof. The legend referring to the support panel in this chart is directed by its lead line to the wrong part, *i.e.*, the guide arm, rather than to the shaded triangular register support panel. Furthermore, the edge of the guide arm does not constitute a stop portion as has been pointed out.

B. The turntable does not rotate partially underneath the register support panel, which, as pointed out, lies outside the area of the turntable.

**Claim 5 of the George Patent Is Not Infringed by the FD-5.
(Appellant's Chart VII)**

D. The register panel is not supported above a quadrant of the turntable, nor does the turntable rotate underneath the support panel. Here again the lead line from the legend relating to this feature points to the wrong part, the guide arm rather than the register panel, which is not labeled.

C. As pointed out, the counter in the FD-5 is the part designated 14, 15 and not the small area discharge throat between the turntable and the scale well. The lead line from the legend concerning the discharge counter points to the wrong part. The counter 14, 15 does not extend as a continuation from the periphery of the turntable. The scale well intervenes.

Claim 6 (Appellant's Chart VIII) Is Avoided by the FD-5.

D. The legend pointing to the guide arm and labelled "stop" is improperly applied, since the guide arm is not a stop but a movement directing guide.

C. The counter 14, 15 does not have a portion thereof conformed to a segment of the turntable. The discharge throat, which is conformed to the periphery of the turntable in accordance with the prior art, is not the "discharge counter" of the patent.

Claim 7 (Chart IX) Is Avoided by the FD-5 in the Following Particulars:

C. The register support, the triangular shaded area, is not positioned over a sector of the receiving counter, but entirely outside the area of the counter as pointed out. The

lead line from this legend points to the wrong part, namely the guide arm which, furthermore, does not constitute a stop, as pointed out.

D. The counter 14, 15, does not extend as an extension of the receiving counter (turntable) adjacent a stop. It is spaced a substantial distance away from the turntable. The legend on this feature is applied to the wrong part, namely the discharge throat which is not the counter.

The Check-A-Matic Model C-3 Does Not Infringe the Patent in Suit.

This check stand, which preceded the FD-5, differs therefrom primarily in that the register support panel [Pltf. Ex. 32, R. 300] does extend over roughly a quadrant of the turntable, and the merchandise guide constitutes the left margin of this panel as faced by the checker. Actually, the panel covers substantially more than a quadrant of the turntable, its rounded acute corner being rounded on a radius approximately corresponding to the radius of rounding of the inner end of the guide arm of the FD-5, and its margin being disposed at approximately the same angle with reference to a radius as in the case of the guide arm of the FD-5, so that articles contacting this leftward guide edge of the panel will not be stopped but will be redirected and moved by the turntable off of its periphery and onto the narrow discharge throat shown at 2. This is the check stand that was demonstrated before the trial court.

This difference in functioning of the guide edge of the register panel in the C-3 as contrasted to the stopping function of the guide edge of the panel of the George patent, is brought out in the preceding discussion of the FD-5, and will not be further discussed at this point.

Claim 3 (Chart II) Is Avoided by the C-3, as Follows:

A. The register support panel does not have a stop portion along one edge thereof.

B. Articles on the turntable are not rotated against a stop portion.

C. The discharge counter does not extend from the turntable adjacent the support panel (see corresponding feature in discussion of the FD-5 in relation to this claim).

D. It is not the end of the discharge counter that extends arcuately along the periphery of the turntable.

Claim 6 (Chart IV) Is Avoided by the C-3, as Follows:

D. The leftward margin of the register panel is not a stop, as pointed out.

C. The discharge throat is not a counter. The counter 15 is not conformed to a segment of the turntable so as to permit articles to be slid from the table onto the counter.

Claim 7 (Chart V) Is Avoided by the C-3 as Follows:

C. The register support does not have a side edge forming an article stop.

D. The discharge throat is not a counter. The counter 15 is not an extension of the turntable nor is it adjacent a stop.

The Check-A-Matic Stands Utilize a Different Concept of Operation.

Alleged error No. 6—that the trial court failed to take into account the allegedly admitted fact that the accused devices utilize the same concept of operation as the patented device for the same purpose.

From the foregoing analysis, it is apparent that the Check-A-Matic FD-5 and C-3 check stands do not utilize the same concept of operation as the patented device. In contrast to George's concept of moving the articles against a recessed side edge of the register support and positively stopping them, at a position of maximum closeness to the side of the register, the accused check stands revert to the teaching of the prior art as exemplified by the Price patent and provide for merely redirecting the movement of the articles from a circular path into a movement toward and off the periphery of the turntable, without stopping.

Appellant's own witness McNeil [R. 78] testifying concerning the C-3, stated:

"Q. The margin of the panel does not actually stop the articles from moving out past the periphery of the disc. does it? A. No, it stops them from going onto the register, but not from going to the discharge counter."

File History Refutes Contention That George Claims Are Broad Enough to Dominate the Check-A-Matic Operation of Redirecting.

This is a contrary mode of operation to that of the check stand of the patent in suit. George, in avoiding repeated rejections by the Examiner in the Patent Office, based on the Bradley patent, insisted that his invention was characterized by the arrangement in which his rotary conveyor will "*positively bring all articles to a stop alongside the cash register*". Having obtained allowance of his claims on the basis of this representation, George (and his successors) can not now contend for a broader interpretation of his claims.

Claim 5 of the Patent in Suit Is Not Infringed by the C-3.

Claim 5 Is Restricted by File Wrapper Estoppel.

Claim 5 of the patent in suit distinguishes from claim 12 of the original application in one respect, namely, in specifying *that the register support panel is adjacent to the discharge counter*. Claim 12, omitting this limitation, was rejected as being unpatentable over the Bradley patent taken with the Wilcox and Price patents. In this rejection (the Examiner's action of July 21, 1950, page 3, last three lines) the *Examiner held that no invention would be involved in replacing the belt conveyor of Bradley by a rotary turntable conveyor as suggested by Price and Wilcox*. The applicant George then cancelled claim 12 and retained claim 5, containing the limitation noted above, *relating to the adjacency of the register support to the discharge counter*. Thus claim 5 cannot be construed as being infringed by the Check-A-Matic C-3 and FD-5 check stands, in which the register stand is not adjacent to the discharge counter, since the full width of the scale well intervenes between the register support and the discharge counter.

Where the Defendant's Machine Embodies an Essential Operating Part That Operates on a Different Principle From the Allegedly Corresponding Part of the Patent in Suit, Such Operating Part Cannot Be Regarded as the Mechanical Equivalent of the Part in the Patent.

Wire Tie Machinery Company et al. v. Pacific Box Corporation Ltd. (C. C. A. 9, 1939), 43 U. S. P. Q. 128;

Kemart Corp. v. Printing Arts Research Laboratories (C. A. 9, 1953), 96 U. S. P. Q. 159.

In the *Wire Tie Machinery* case the Court said:

“The argument seems to be that the claims of '259 were broad enough to cover any means of encircling a tensioned binding wire about an object to be bound and tied, and means for securing the wires in a substantially flat joint.”

The Court proceeded to hold that the ring gear of the defendant's device was not the mechanical equivalent of the revolving arm of the patent in suit, and further commented:

“Appellant cannot be permitted to construe his claims with reference to his drawings and specifications in order to escape invalidity, and then in the next breath seek to disregard the drawings and specifications in order to start infringement.”

These Cases Hold That This Rule Applies Even Where the Defendants' Device or Process Falls Within the Literal Term of the Claims of the Patent in Suit.

In the *Kemart* case, this Court stated:

“the fact that the claims of the Marks patent are broad enough to cover appellant's process does not establish infringement. The claims are to be read in connection with the specifications, and a patentee's broadest claim can be no broader than his actual invention.”

In *Goodman v. Suppermold* (C. A. 9), 41 U. S. P. Q. 188, the patent in suit described and showed a tire mold having two annular rings for pressing against respective sides of the tire, but claim 12 of that patent specified only a single ring. This Court found

“The mode of operation of the apparatus according to the specifications depends upon the combina-

tion with a ring on each side of the tire. The patent does not teach the use of a single ring pressing against only one side of the tire, and such use cannot be claimed. [R. S. 4888].”

In its summary, the Court held that this claim was invalid for incompleteness.

The C-2 Stand.

The C-2 check stand, of which one or two were made, is referred to intermittently in the records along with the C-3. The appellant states that the C-2 had a leftward edge extending on a true radius of the turntable, but there is no evidence in the record to substantiate this, and counsel is not so advised that this was the case. Since it was the burden of appellant to establish proof of the C-2, which burden has not been sustained, there is no basis for a ruling as to the C-2.

Conclusion.

In conclusion, it is submitted:

A. The patent in suit is invalid:

1. For overclaiming the aggregational assembly of old discharge counter and old turntable in the old combination of conveyor, register stand and discharge counter.

2. For lack of invention in the bringing together of these old components in the old assembly shown by Bradley.

B. The patent is narrow and restricted, the accused Check-A-Matic stands do not utilize the same arrange-

ment of parts nor the same mode of operation, and accordingly, none of them infringe.

The Court is respectfully requested to affirm the decision of the District Court in this case and to render a decision determining the lack of infringement in the accused Check-A-Matic stands.

Respectfully submitted,

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M. Gross, individually and doing business as
Check-A-Matic Co., Appellees.*

IN THE
**United States Court of Appeals
for the Ninth Circuit**

**WM. T. ALVARADO SALES CO. and
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Appellants,

vs.

SIDNEY S. RUBALOFF and ABRAHAM M. GROSS,
individually and doing business as
CHECK-A-MATIC CO.,
Appellees

**WM. T. ALVARADO SALES CO. and
SPEE-DEE CHECKOUT SYSTEMS, INC.,**
Appellants,

vs.

DU-MORE FIXTURE CO., INC.,
Appellee

APPELLANTS' REPLY BRIEF

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FILED

AUG 11 1958

PAUL P. O'BRIEN, CLERK

INDEX

	Page
Reply to brief of appellees Check-A-Matic et al.....	1-18
Reply to brief of appellee Du-More Fixture Co., Inc.	19-27

TABLE OF CASES

Bisley, In re (C. C. P. A.), 197 F. 2d 355.....	8
Graver Tank Co. v. Linde, 339 U. S. 605.....	25
Hazeltine Research, Inc. v. Admiral Corp. (C. A. 7), 183 F. 2d 953.....	18
Marchus v. Druge (C. A. 9), 136 F. 2d 602.....	18
Morrill v. Automatic Industries (D. C. Mo.), 93 F. S. 697	8
Oxnard Cannery, Inc. v. Bradley (C. A. 9), 194 F. 2d 655	8
Western States Machine Co. v. S. S. Hepworth Co. (C. A. 2), 147 F. 2d 345.....	16

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vs.

SIDNEY S. RUBALOFF and ABRAHAM M. GROSS,
individually and doing business as
CHECK-A-MATIC CO.,

Appellees

WM. T. ALVARADO SALES CO. and
SPEE-DEE CHECKOUT SYSTEMS, INC.,

Appellants,

vs.

DU-MORE FIXTURE CO., INC.,

Appellee

APPELLANTS' REPLY BRIEF

This brief is in reply to the two briefs of defendant-appellees Check-A-Matic Company and Du-More Fixture Company. The arguments of the appellee Check-A-Matic will be considered first and then the arguments of appellee Du-More.

REPLY TO CHECK-A-MATIC-BRIEF

Issue is first taken with the appellants' inference at page 2, last paragraph of Check-A-Matic brief that appellants and the George patent claim a patent covering any check stand with any turntable. Appellants agree that their patent extends to a specific arrangement of elements as defined in the claims. Neither do appellants ignore any restrictions in the claims as alleged in the last paragraph on page 3 of the Check-A-Matic brief. The structure and combination defined in the claims is substantially more than, and different from, a simple substitution of one type of article conveyor for another in a grocery store check stand. The mounting of the rotatable turntable in the check stand of the George patent in the relationship defined in the claims was more than a substitution and, contrary to the contention labeled (a) at the top of page 4, was the first use of a turntable in a checkout counter or station. If by this latter reference appellee Check-A-Matic alludes to the Florence patent it neglects to point out that the Florence turntable is not a checkout device but is merely a rotating display device on which articles rotate continually until picked up by a customer. Similarly the argument labeled (b) at the top of page 4 is erroneous and improperly generalized because no prior patent cited uses a turntable and guide arm for deflecting food items off of the turntable. If by this reference Check-A-Matic alludes to the Price patent it neglects to point out that the Price device does not handle food items but only advances a succession of identical empty containers to some sort of undisclosed filling or processing apparatus.

Error No. 1 (Check-A-Matic, page 5)

While the Court obviously received the information that the patentee George was the first to employ a turntable in a check stand there is nothing in the findings or minute order decision which indicated that the Court gave this fact any consideration in arriving at its decision. Contrary to the implication by appellee, appellants do not broadly claim any turntable in any check stand but this does not mean that the use of a turntable in the particular manner defined in the claims is not inventive.

Error No. 12A (Check-A-Matic, page 8)

The cited patents, of course, speak for themselves as to what they do or do not disclose but appellee Check-A-Matic is inaccurate in stating that the Florence patent discloses the use of a turntable for advancing groceries to a checkout point. This statement is a corruption of the term "checkout point" as in no sense do the arcuate tables 6 of the Florence patent correspond in function to the checkout stand of a supermarket. Appellants' allegation of error 12A is submitted to be entirely accurate in that there is no disclosure in the prior art of a rotatable turntable having been used in a checkout stand, the stand being adapted to support a cash register for the purpose of checking the customers' purchases at a self-service store.

Error No. 4 (Check-A-Matic, page 9)

Appellee's argument admits utility but seeks to avoid or deny improved action by comparing the generalities of the functions of movement of articles, checking of articles and disposing of articles. Certainly appellants do not contend and never have contended that the George check stand was the first to perform these functions. In its reference to the

Bradley patent, appellee Check-A-Matic fails to take into account in George the transverse movement of the articles of purchase from the outside of the check stand to the inside thereof to a point *directly and immediately* along side of the cash register position. The distinction between the George device and the Bradley device lies in the closer proximity of the articles to the cash register at the end of their motion on the George stand. This appellee conveniently disregards and the question is properly raised that if the function of the George stand is no improvement over the Bradley stand, why did the appellee Check-A-Matic adopt the George stand as its commercial article rather than the Bradley Stand? As pointed out by appellee at the top of page 10, Bradley shows the need for an attendant to unload the articles of a customer's purchase onto the belt but the George patent in suit eliminates the need for this attendant and still advances all articles of a purchase at least as close to the cash register as the Bradley belt with an attendant.

Error No. 5 (Check-A-Matic, page 10)

This allegation of error by appellants is reaffirmed as there is no point in the findings of the district court or comments of the court indicating that the improved results of the George stand were considered by the court. Appellee's contention that the inner side of the Bradley belt is as close to the cash register as the stopping point for articles on the George stand completely disregards the evidence at record page 107 that the *majority* of articles placed on a belt type check stand by the customer will be placed on the outside of the belt furthest from the cash register and the checker. At no place does the appellee controvert the fact that the George patent brings all articles closely adjacent the side of the cash register. Indeed they could not make such a contention as the accused stands all do the same thing.

NOVEL RESULT IS NOT INCONSEQUENTIAL

(Check-A-Matic, page 12)

Appellee now attempts to belittle the advantage of bringing items too closely along side of the cash register as distinguished from a location at varying positions outwardly from the side of the cash register to the outer edge of a belt type check stand and they cite testimony referring to items located on the outside of a belt and on radially inwardly disposed positions of the turntable. Anyone will realize that extreme positions exist on any conveyor and it is misleading to compare the favorable extreme of one type stand with the unfavorable extreme of the other type stand. The point avoided by appellee is that the majority of the articles of a customer's purchase will be placed by the customer at the most convenient point which is the outer edge of the belt in a belt type stand and the outer periphery of a turntable in a turntable stand. The substantial improvement of the George stand over the belt type stand becomes immediately apparent when considering this position in which the majority of items are unloaded because the George stand will advance these articles closer to the checker than the belt type stand. Appellee contends that a checker can reach articles on a belt type stand which is undoubtedly true but if the increased ease with which the checker reaches articles on the George stand is so inconsequential as now argued by appellee why did the appellee adopt the George type stand in preference to the belt type stand?

A further advantage of the new transverse movement of articles on the George check stand is the decreased tendency of customers to handle articles once placed on the turntable and appellee cites no point where the Trial Court considered this advantage. Neither does appellee

cite any testimony controverting the testimony at record page 238-240 that this reduces loss to the store operator.

Error No. 3 (Check-A-Matic, page 13)

The appellee attempts to overcome the evidence of novel coaction by overly generalizing the functions performed by the check stands and neglects to answer the specific differences which have been pointed out by appellants. Granted that a conveyor belt such as Bradley has an inactive return reach traveling under its upper working reach, no part of the belt moves underneath a cash register or cash register support and since there is no need for positioning a belt under a cash register there can be no suggestion from the Bradley patent and other belt type stands that any part of any conveyer might advantageously be positioned to operate underneath a cash register support. Neither is the stop plate 83 of Bradley (Fig. 10) in any way the equivalent of appellants' stop arrangement, structurally or functionally. It will not cause all articles on the belt to advance to a location *directly* along side of the cash register because as is obvious the majority of items will remain on the outer side of the belt. Appellee attempts to confuse the issue by using the phrase "close to the side of the cash register" to include the entire width of the belt and it fails to consider, as the Court failed to consider, the distinction between transverse movement to *directly* along side a cash register as in George, and parallel movement *in space relation* from the cash register along the outside of the belt as in Bradley and other belt type stands.

The argument at the bottom of page 15 that the gap in the discharge or bagging counter provided for the reception of a weighing scale avoids the designed function of the George discharge counter is spurious. In those check

stands which include a scale well the scale platform is located flush with the adjacent surfaces of the discharge counter and is an effective continuation thereof. Appellee can not, by dividing a counter into two or more panels contend that it no longer amounts to a counter. Actually the length of the rearward extension of the discharge counter of the George patent behind the checker is immaterial so long as some support is there to receive the checked articles and so long as the forward end of the discharge counter is conformed to the edge of the rotating turntable and so long as the discharge counter is positioned with its forward end closely along side of the register support where the rotary movement of articles on the turntable is interrupted. Certainly discharge counters have been arranged as flush continuations of the belt conveyors as in Bradley but the discharge counter of Bradley would not function with a turntable and appellants' contention that there is a novel coaction between the discharge counter with its arcuate front end and the circular turntable and the register support oriented as defined in the claims is reaffirmed. Also reaffirmed is allegation of error 3 that the Trial Court did not consider the novel coaction of parts that provides transverse advancing motion of articles and a clear continuous discharge path in the George stand.

GEORGE PATENT IS NOT MERE AGGREGATION

(Check-A-Matic, page 17)

Appellee goes to considerable length to point out that the discharge counter of the patent in suit receives articles from an advancing conveyor and that prior belt type stand did the same thing. This generality is obviously true but neglects to consider the specific differences between the structures and the specific limitations included in the claims. It also neglects to consider the closer prox-

imity to the checker of all articles advanced on the George turntable. The argument further entirely neglects to recognize that the turntable and cash register support of the George patent would be entirely useless and inoperative if left or considered alone. It is essential to the successful operation of all turntable type check stands that the front end of the discharge counter extend from directly along side of the cash register support arcuately around a portion of the periphery of the turntable and the claims are so drawn. An element of a claim which constitutes an essential part of an operative combination can not be considered as an unnecessary element or make the claim invalid for overclaiming. Especially is this so when the new combination produces an improved result. *Oxnard Cannery, Inc. v. Bradley*, (C. A. 9) 194 F. 2d 655. Further, overclaiming or "aggregation" do not exist when the parts of the combination which may be broadly old require modification to fit into the new combination. *In re Bisley*, (C. C. P. A.) 197 F. 2d 355. Note that the old discharge counters in the art require modification to coact with the George turntable. Further the combination claimed should be viewed as a whole rather than as a group of individual elements. *Morrill v. Automatic Industries* (D. C. Mo.) 93 F. S. 697.

Error No. 2 (Check-A-Matic, page 19)

Appellee's argument with relation to the sufficiency of the prior art to suggest the combination claimed by George is limited to a citation of points in the record where appellee's expert witness stated what *he* would do if converting the prior art patents to the structure of the George patent. However, this is merely a hindsight reconstruction by this expert or other persons who prepared the charts for the expert and appellee still does not refer to and cannot

refer to any portion of the record which indicates in any way that the prior art in and of itself suggests the combination of elements disclosed for the first time and claimed by George. This same expert expressly declined to state that one or more patents suggested the combination. (Appellants' primary brief page 23), and this same expert expressly stated that if the turntable of the Price patent were to be substituted, as one conveying device for another, for the belt of the Bradley patent *according to the teaching of the Bradley patent* that the turntable would be positioned along side of the cash register support (Appellants' brief page 22). This is clearly distinguishable from the position of the turntable in the George stand *partially underneath* the cash register and appellants' allegation of error 2 is reaffirmed further by the insufficiency of the record to disclose the position of parts claimed by George.

Error No. 7 (Check-A-Matic, page 23)

Appellee's argument against this citation of error is itself erroneous in that the Bradley patent *was* cited by the Examiner against the George application. The art cited by the Patent Office included the belt type stand of Bradley and the turntables of Trench and Price and Wilcox in remote arts different from the art of grocery store check stands and nothing in the art newly advanced by appellee shows any material difference from the art considered by the Patent Office. The insufficiency of the Florence rotary display device as a conveyor terminating at a checking position has been discussed and will not be considered further.

Errors 9, 10 and 11 (Check-A-Matic, page 25)

No statement in the findings of the District Court or its minute order opinion indicates any consideration of the commercial success or the appellee's copying of the patented device. Appellee states that there is no evidence of the Court's failure to consider these points but it is, of course, an impossibility to cite evidence of an omission other than to point to the omission itself. Appellee does not cite any place where it was considered. The same is true of the failure of the trial court to consider the presumption of validity. With reference to error No. 11 on page 26, appellee's contention that other mechanized stands were developed before the George stand is an irrelevant comment. In fact the comment defeats itself because it recognizes that others had been working on mechanized stands long prior to the entry of George into the field. This is exactly appellants' contention that others had tried to mechanize checkout stands but had not been able to succeed to the degree achieved by the patentee George.

APPELLEE'S ARGUMENT AGAINST INFRINGEMENT**Error No. 8 (Check-A-Matic, page 27)**

The arguments by Check-A-Matic beginning on this page relate to the question of infringement and also the validity of the George patent in as much as they emphasize the completeness with which appellee Check-A-Matic has adopted the structure and concept of the George patent. Appellants will here consider the arguments presented by Check-A-Matic in the same order as in the Check-A-Matic brief.

CHECK-A-MATIC FD-5 CHECK STAND

Appellee attempts to distinguish its FD-5 stand from the claims of the patent by a distinction in terms. Referring to Exhibit 3 (Record 305) they designate the elongated arm 17 that extends to the center of the turntable as a merchandise guide and separately refer to the shaded segmental panel along the periphery of the turntable as a register support panel. They further point out that the left side edge of the so-called merchandise guide is inclined relative to a true radius of the turntable and point out that articles advanced against this edge will travel along the guide to the outer edge of the turntable if the turntable continues to rotate. This is not controverted by appellants. Appellee takes the position that the so-called merchandise guide is no part of the register support panel and that the inclined article directing edge is not a stop because it does not absolutely stop movement of articles on the turntable.

Appellants contend that the Check-A-Matic arguments are untenable and that the so-called merchandise guide is legally and in fact part of the register support panel. Obviously it extends across the surface of the turntable, and obviously its left side edge acts to interrupt and stop the rotating motion of articles on the turntable. Nothing in the claims of the George patent requires that the articles placed on the turntable shall be brought to a complete and absolute stop and as was pointed out on page 30 of appellants' primary brief, appellee's expert admitted that the function of checking out items of a purchase was the same on the FD-5 Check-A-Matic stand as it was on the stand of the patent in suit insofar as the actions of the checker were considered.

The Court's attention is invited to plaintiff's Exhibit 10C (Record 265) which clearly shows the register supporting function of the so-called merchandise guide of the Check-A-Matic FD-5 check stand. The merchandise guide here appears with its left side edge facing the observer and a circle was drawn by the identifying witness around the supporting block that directly supports the cash register from the merchandise guide. This is one example of a use to which the FD-5 check stand is put in actual practice in the field. Certainly this use includes a register support panel that extends across and above the surface of the turntable and has an article interrupting or stopping edge along its left side as viewed by the checker within the terms of the claims of the George patent.

Appellee Check-A-Matic protests that the blocking up of the forward corner of the cash register from the merchandise guide is the work of the store owner for which Check-A-Matic should not be held responsible. Check-A-Matic further claims that not all of their check stands are used as shown in Exhibit 10C. It is submitted that these arguments are untenable first because the check stand as sold by appellee is obviously adopted for use in the manner illustrated in Exhibit 10C and appellee must be considered as knowing that it might be so used in the trade. Even more important than the question of the register supporting block appearing in Exhibit 10C is the relationship between the right hand end of the so-called merchandise guide and the left edge of the register support panel which appears clearly beneath the front edge of the cash register and extends half way along the depth of the register between the bottom of the cash register and the merchandise guide. Obviously this left edge of the register support panel is supported, at least in part, from the upper surface of the merchandise guide and in turn supports the forward left

corner of the cash register. Thus even if the block encircled in Exhibit 10C were removed and the register placed on the register support panel as suggested by appellee the merchandise guide of the FD-5 would still function to support the cash register by supporting the left edge of the register support panel.

Appellee Check-A-Matic in an attempt to avoid the claims of the George patent has divided the register support structure of its stand into two parts and labeled them separately as the merchandise guide and the register support panel. However, the two parts still function to support the cash register and taken together they extend across the surface of the turntable to function in the same manner as the register support panel of the patent in suit. Appellee cannot by thus dividing one element into two separate parts avoid the infringing character of the parts as they function in combination.

It is respectfully submitted that the application of the claims in suit to the Check-A-Matic FD-5 check stand appearing graphically on appendix pages VI, VII, VIII and IX of appellants' brief, accurately and properly apply the terms of the claims in suit to the FD-5 check stand and fully support appellant's assignment of error No. 8.

In claim 3 as illustrated on page VI the so-called merchandise guide is in fact a part of the register supporting panel as pointed out above and the first element "A" of the claim is properly and graphically associated with the check stand illustrated.

With reference to claim 5 and page VII, the element "D" is properly associated with the merchandise guide as indicating a functional part of the register support panel which extends across the turntable and is therefore above a quadrant of the turntable with the turntable arranged to rotate

freely in closely spaced relationship underneath said support panel. In regards to appellee's argument that the throat area designated by the element "C" is not a discharge counter, it is pointed out again that appellee cannot, by giving different names to parts of their check stand, avoid the infringing character of the stand. The area indicated by the lead line from the element "C" on page VII of appellants' brief is, in fact, the forward end of a discharge counter and it is immaterial that appellee subdivides this discharge counter into a forward end designated as a throat and an intermediate scale platform and a rear area designated as a bagging counter. The parts taken together function as a discharge counter in the manner defined in the claim and as disclosed by the patentee George.

With reference to the application of claim 6 to the FD-5 check stand (appellants' chart VIII) the left side edge of the merchandise guide is, in fact, a stop within the proper meaning of the claim because it interrupts or stops the rotary motion of articles on the turntable. Nothing in the claim requires the word "stop" to have a meaning indicating an absolute stopping of motion of articles on the turntable. Again the appellee's subdivision of the discharge counter into three successive portions cannot avoid the limitation of element "C". To hold otherwise would be to permit practically any patent to be avoided simply by sawing in two any element required and claiming that because one end of the element was not continually connected to the other it would not constitute the equivalent of the part defined by the patent.

With reference to claim 7 and the FD-5 check stand compared graphically on page IX of appellants' main brief the guide arm 17 and the shaded triangular area function together as previously described to form a register support panel as defined in element "C" of the claim as illustrated.

Again appellees cannot avoid the obvious functional purpose of these elements by making them in two pieces and calling one a merchandise guide and the other a register support panel. The argument with reference to the discharge counter element "D" is the same as that just discussed.

CHECK-A-MATIC MODEL C-3

The application of the claims of the patent in suit as graphically set out on pages II, III, IV and V are resubmitted as being fully accurate. Appellee's argument against these applications is that the said edge of the register supporting panel is inclined and therefore does not constitute a stop. As has been already pointed out nothing in the claims requires that the stop do more than interrupt or stop the rotating motion of items on the turntable and appellee's inclining of this stop to obtain an additional radial feeding motion cannot eliminate the function of the stop or change its character to something other than a stop as defined by the claims.

Likewise appellee's subdivision of the discharge counter into separate section cannot avoid the claims or the character of the discharge counter as a whole to perform its article receiving function in the manner disclosed by the patent and for the purpose defined in the claims.

CHECK-A-MATIC STANDS USE THE SAME CONCEPT OF OPERATION AS PATENT

Error No. 8 (Check-A-Matic, page 34)

Appellee's argument claims a significant distinction between the inclined side edge of their "merchandise guide" and the "stop" at the side of the register support as defined in the claims. It is pointed out first that nowhere in the

findings of the District Court is such a distinction referred to or relied on. The District Court simply failed to compare the actions of the patented and accused stands and the assignment of error is valid.

Further, the alleged distinction is no distinction in fact. In order to sustain their contention appellees must read into the patent an interpretation of the word "stop" as requiring a complete and absolute stopping and full absence of motion of articles on the turntable because of the "stop." No such interpretation is required of the claims and no reference in prior art requires such an interpretation to sustain the validity of the claims. Neither did the applicant's prosecution of the patent in suit interject such an interpretation of the term "stop".

No reference patent shows a check stand with a turntable advancing articles against the side of a register support panel (inclined or otherwise) so the inventor George did not have to use the term "stop" in a restrictive sense to distinguish between an inclined stop that permitted a camming action and a true radial stop that absolutely stopped all motion.

Note that claim 1 of the George patent (R. 254) specifically requires (line 13)

"a second edge of said panel adjacent said first edge *extending radially* from said post across said turn table to form a stop over said turn table,".

Appellee's argument would be valid if the underlined limitation above appeared in the claims in suit *but it does not*. The very fact that the specific limitation to "radially extending" was omitted from the claims in suit indicates no similar limitation was intended or required in the claims in suit. *Western States Machine Co. v. S. S. Hepworth Co.* (C. A. 2), 147 F. 2d 345.

The portion of the file wrapper of the George patent cited by appellee is taken out of context and is inapplicable. At the point cited the inventor was comparing his turntable stand to the belt type stand of Bradley and pointed out that the turntable of the application would stop articles where the Bradley belt it was possible to move articles on past the register without checking. Thus the term "*stop*" referred to stopping articles immediately alongside the cash register and this is just what the accused devices do.

The word "positively" as used by the inventor George early in the prosecution of the application was used in the sense of "assurance" of stopping or interrupting motion rather than in the sense of the "degree or absolute absence" of motion.

ACCUSED REGISTER SUPPORT PANEL IS ADJACENT TO DISCHARGE COUNTER

(Check-A-Matic, page 36)

Appellee seeks to avoid infringement on the ground that the scale well of its stands separates the rear end of the discharge counter from the register support panel. This argument is spurious for two reasons. First, as has been pointed out, appellee's division of their discharge counter into a back bagging section, middle scale pan section, and front "throat" section cannot destroy the functional character of the discharge counter as a whole extending rearwardly and functionally continuously from the turntable adjacent the register support panel. Second, the forward "throat" portion of the Check-A-Matic discharge counter is sufficient to meet the requirements of the claims for a discharge counter located "adjacent the register support panel." The claims do not specify how far rearwardly the discharge counter shall extend or what it shall consist of.

The addition of an element (scale well) which in no way affects the operation of the combination claimed does not avoid infringement. *Hazeltine Research, Inc. v. Admiral Corp.* (C. A. 7), 183 F. 2d 953; also *Marchus v. Druge* (C. A. 9), 136 F. 2d 602.

CASES CITED ARE INAPPLICABLE

(Check-A-Matic, page 36)

The argument and cases presented are irrelevant because appellants do not seek to establish one interpretation for validity and another for infringement. Appellee may have added to the structure and function covered by the patent but it has not substituted for or avoided any of the functions or structure covered by the George patent.

REPLY TO THE BRIEF OF APPELLEE DU-MORE FIXTURE COMPANY

Appellants first note that while Du-More contends on page 2 of its brief "that there was no admitted novelty of the patented device", appellee follows on page 3 with the comment: "The only admission of the defendants was that in a check stand George was the first one that put a panel over a quadrant of the turntable." It is submitted that the latter statement is clearly an admission of novelty and that appellee starts its brief by at least clouding the issues if not making absolutely unsupportable assertions.

Appellee Du-More goes on at the bottom of page 3 to urge the invalidity of the George patent for overclaiming but it should be noted that the findings and judgment of the District Court (R. 31) were in no way based on the defense of overclaiming. In fact finding 11 (R. 34) expressly eliminates defenses not mentioned. The introduction of the Du-More brief thus further clouds the issue of the sufficiency and correctness of the judgment appealed from. With this preamble, appellants turn to the argument of the Du-More brief.

MODE OF OPERATION

(Du-More, page 7)

The statement that customers load their items of purchase all over the surface of the turntable is only partially accurate and is misleading. Actually the *majority* of items of a purchase are placed in the position most convenient to the customer which is along the periphery of the turntable (R. 107).

Du-More's description on pages 8 and 9 of how various checkers operate the checkstand is accurate but it should

be noted that the alternatives of picking up items before they reach the cash register or letting them abut against the register apply to both the accused and the patented checkstands. Also it must be noted that in comparing belt type stands to patented turntable type stands, the checking positions described by Du-More as the "same general position" are not in fact the same. The belt provides a position or checking area that is dispersed laterally away from the cash register at an ever increasing distance from the checker while the patented George stand provides a checking area that is always directly alongside of the cash register. True, the area extends from the front to the rear of the register but as was pointed out in the reply to the Check-A-Matic brief at page 4 *supra* the *majority of items* will be closest to the checker on the turntable and furthest from the checker on the belt.

As with the case of Check-A-Matic appellants ask: If there is no distinction between the two, why did appellee Du-More adopt the turntable type in preference to the belt type stand? This query applies also to the footnote on page 13 of Du-More's brief and it is noted that the footnote fails to consider the advantage of the George stand that moves articles away from the customer and reduces the tendency for the customers to rehandle the articles, honestly or dishonestly.

On page 12 Du-More cites a number of cases alleged to show that "far more colorable patents" have been held invalid but no comparison of the facts of the cases to the present case are given. The candle case has already been cited by appellants and it is noted that in that case, *all* elements and functions of the combination claimed were found in the *identical* art of candles. This situation is clearly distinguishable from the instant case where the element of a turntable is found only in a remote art and where

the function of *moving articles transversely* to the side of a cash register *is entirely novel*. This fact in itself is submitted to be sufficient to show that the Trial Court's findings were clearly erroneous within the definitions of the cases cited by appellee on pages 14 and 15 of its brief.

Appellants do not controvert the authorities cited by Du-More on pages 16 and 17 but point out that the facts of this case are not comparable. George did not merely substitute a turntable conveyor for a belt conveyor. He devised a new combination and in so doing he modified the old cash register supports and the old discharge counters of the prior art in order to make the new combination operative and obtained a novel result. The cited testimony of the witness Sellers on page 17 of Du-More is merely a hind-sight explanation of what George did and *nothing in this testimony shows where or how the prior art teaches or suggests the changes which George devised to arrive at the new combination*.

On page 13 Du-More repeats the erroneous assertion that a belt type stand brings articles to the same position as the patented turntable type stand. Appellee recognizes that there is a difference in that the turntable goes partly under the cash register and attempts to belittle the difference but this difference is the very thing or relationship that provides the novel and advantageous result of the patented George stand.

With reference to page 20 of Du-More's brief appellee makes an unwarranted assertion, probably hopefully, with reference to the conformation of the front end of the discharge counter. Contrary to appellee's hopes, appellants do contend that the conformation of the front end of the discharge counter to make it fit flush with the turntable as part of a new coaction of parts. It is new, it coacts directly

with the turntable and the register support in bringing the discharge counter close to the cash register and it is necessary to an operative stand.

The quoted testimony and argument on pages 20 and 21 of Du-More is irrelevant because it deals only in generalities of checking out items in a self service store. It omits reference to the detailed improvements within these generalities on which appellants rely. The irrelevancy is emphasized at the top of page 22 by the oft repeated and unwarranted attempt to avoid and cover up the distinction between the checking positions of a belt type stand and the patented George turntable type stand. The "same general area" referred to by appellee begs the issue of this case.

On pages 22 to 24 Du-More attempts to belittle the utility and the advantages of the patented turntable type stand which they have lauded to the public. It is pointed out that while their self interested witness was careful to draw a distinction between belt type stands and non-mechanized stands in court, he made no such distinction in his advertising to the public as shown by plaintiffs' exhibit 30 (R. 298). The advertisement to the public claims unqualified superiority over all other stands, just as do the ads of the other appellees and appellants (R. 13, 25 and 31). It is submitted to be significant that the appellee Check-A-Matic does not attempt to make a similar assertion that the turntable type stand is not an improvement over the belt type stand. Again the question is asked: If the George stand is no improvement over the belt type stand why did appellee adopt it as his product.

If the turntable type stand impedes the vision as suggested by appellee at the top of page 26 without supporting evidence, why does appellee use it?

The price identification advantages of appellants' stand are not ridiculous as is asserted on page 26. Neither can it be established by judicial notice that all checkers check from memory. Otherwise why do stores go to the trouble to stamp the prices on their goods? Checkers probably use both memory and the price stamps. No testimony is needed to establish the fact that as an object comes closer to an observer, its details become clearer and more distinguishable. The advantage of the George stand in making identification of items and prices easier is self-evident and it is recalled that while this advantage may seem insignificant when considering one article and one check operation, it is material when multiplied 10,000 times a day which was established as an average checkers daily work.

To the quoted testimony on page 26-27 must be added the testimony on Record page 240 to the effect that customers do not rehandle articles on appellants' stand. This establishes the advantage of reduced losses because if the checker handles all articles she will check all of them.

The testimony regarding carts alleged on page 27 to be missing is found at page 49 of the record and establishes the advantage of customer convenience with the patented George stand. Since any patentee is entitled to the benefits of his invention, regardless of how used, it is not necessary that the cart handling function be described in the patent.

On pages 28 to 31 appellee Du-More raises the question of overclaiming and the question of the curved inner edge of the discharge counter. The question of overclaiming is discussed and answered in the reply to Check-A-Matic at page 8 *supra*. The curved inner edge of the discharge counter, while originally claimed as novel by George now appears to be anticipated by Muse and is disclaimed, *per se*, by appellants as a point of novelty. This does not alter the fact that claim 6 still contains the patentably novel relationship between the turntable, register support panel and the discharge counter generally.

DU-MORE INFRINGEMENT

(Du-More Brief, page 32)

The Du-More argument against infringement asserts three points:

1. Du-More has no "stop" because the electric eye is supposed to stop articles before they reach the register support panel.
2. The Du-More register support panel is cantilever supported from the right and so is not supported "from a point adjacent to the discharge counter".
3. The Du-More discharge counter has an angular inner edge and so does not curve concavely arcuately around the back of the checkers' position. (Claim 3.)

Point 1 is adequately disposed of at pages 32 and 40 of appellants' main brief where it is pointed out that the overrun of the turntable carries articles against the side of the cash register and the cash register support panel. It is here further pointed out that nothing in the claims requires that articles touch any part of the register support. The George switch (claim 5) or means (claim 3) for controlling the motor and turntable may stop the turntable before articles touch the register support panel. The electric eye of Du-More is "designed" to do just this. The "stop element" of the George claims is a secondary or safety element to stop articles alongside the cash register in case the checker or the control does not stop them in time. This is just what Du-More's expert said the side edge of its register support panel was available to do if needed.

Referring to the rule noted at page 19, *supra*, in the reply to Check-A-Matic, adding an additional element (the elec-

tric eye) while still retaining all the elements of the claimed combination cannot avoid infringement.

Point 2 is a spurious argument. Appellee did not direct the printing of that portion of the file wrapper to which it refers but it is acknowledged that the words "adjacent to said counter" were added by the applicant George to his claim 13 (now claim 5 in suit). However, this addition was not made in order to distinguish one point of support from any other in the prior art. It was made to orient the location of the register support panel as to its position relative to the discharge counter. As originally presented claim 13 merely called for the register support panel to be "supported above a quadrant of said turntable" and this general requirement would have covered or described a location of the panel over any quadrant including those on the opposite side of the turntable or directly at the end of the discharge counter. In these positions the stand would have been ineffective. The Examiner's first action, paper No. 3, on page 2 rejected all claims as inconsistent and in later pages pointed out inaccuracies and vagueness in other claims. No art was cited against claim 13. The applicant George in his first amendment added the words in question to locate the position of the register support panel. It was not added to locate a point of support as contended by appellee. The irrelevance and inaccuracy of the argument indicates the weakness of appellee's case with reference to infringement. The case of *Graver Tank Co. v. Linde*, 339 U. S. 605, contains an appropriate comment on superficial variations from a patented device where it states:

"One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthwith du-

plication is a dull and very rare type of infringement. *To prohibit no other would place the inventor at the mercy of verbalism and would subordinate substance to form.*" (Emphasis added.)

Note that this same comment is very applicable to Check-A-Matic's use of the separate part called a "merchandise guide" located closely alongside the register support panel and performing the same function as the side edge of the register support panel of the patent in suit.

Point 3 applied only to claim 3 in suit and it is appellants' position that the angularly concave inner edge of the Du-More stand is the full functional equivalent of the concave inner edge required by the claim and that the adjective "arcuate" as used in the claim to qualify the word concave should not be interpreted as strictly limiting the claim.

With the foregoing explanations in mind, the graphical applications of the claims in suit to the Du-More stand as appearing on pages X to XIII of appellants' main brief are submitted to be reasonable, accurate and within the proper legal interpretation of the claims.

Summary

It is submitted that the points and defenses raised by both appellees are limited to strained and untenable interpretations of words in the patent in suit and unjustifiable comparisons of these interpretations between the structures of the prior art and the structure of the George patent in suit. With reference to the question of infringement it is submitted that the distinctions in structure relied upon by both appellees are inconsequential and immaterial variations of the structure of the George patent in suit.

It is submitted that the 20 numbered point of error and statements of fact appearing at page 42 in the Conclusion of appellants' main brief are accurate and reasonable and that they fully support appellants' prayer for reversal of the judgments of the Trial Court and for a finding of infringement by both appellees.

Respectfully submitted,

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FRED H. MILLER,
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Of Counsel.

IN THE

United States Court of Appeals for the Ninth Circuit

WILLIAM T. ALVARADO SALES CO. and
SPEE-DEE CHECKOUT SYSTEMS, INC.,
Appellants,

vs.

SIDNEY S. RUBALOFF and ABRAHAM M. GROSS,
individually and doing business as
CHECK-A-MATIC CO., and
DU-MORE FIXTURE CO., INC.,
Appellees

PETITION FOR REHEARING

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FILED

MAR 4 1959

PAUL P. O'BRIEN, CLERK

SUBJECT INDEX

	Page
Facts	2-4
Invention Is Matter of Law.....	5
Test of Invention.....	5-11
Summary	11-13
Certificate of Counsel.....	13

INDEX TO CASES CITED

General Electric Co. v. Jewel Co., 326 U. S. 242, 249	2, 6
Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp., 340 U. S. 147, 155.....	2, 5

IN THE
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DU-MORE FIXTURE CO., INC.,
Appellees**

PETITION FOR REHEARING

To the Honorable Stanley N. Barnes, Frederick G. Hamley and Gilbert H. Jertberg, Circuit Judges:

Appellants, William T. Alvarado Sales Co. and Spee-Dee Checkout Systems, Inc., hereby petition this Honorable Court that the above entitled cause be reheard and that the judgment of the Court entered therein on February 6, 1959 be set aside.

Certificate of counsel for appellants that in his judgment this petition is well founded and that it is not interposed for delay is filed herewith. Proof of service of this petition on counsel for appellees is also filed herewith.

Appellants state that the ground for this petition is the apparent creation and application by the Court of a new standard of invention which is not required or supported by statute or Supreme Court decisions and which is therefore improper. It is respectfully submitted that the facts of this case, as stated by this Court in its opinion, when measured against Supreme Court decisions, fully support and require a finding of validity of the patent in suit. More specifically it is submitted as grounds for this petition that the Court misinterpreted and misapplied the rules stated by the Supreme Court in the cases cited by this Court in support of its decision.¹

FACTS

In its opinion this Court found and stated the following facts which are accepted and relied upon by petitioners as pertinent and relevant to this petition. The facts are quoted in the order of their appearance in the Courts opinion, with emphasis added.

1. "The structure of the patented check stand is not complex."

2. "A support panel, constructed slightly above the quadrant of the turntable furthest from the customer and closest to the checker, *provides a convenient place* for the cash register. The left side of the support panel may also perform the additional function of acting as a stop for the articles being pur-

¹ The cases cited were General Electric Co. v. Jewel Co., 326 U. S. 242, 249; and Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp., 340 U. S. 147, 155.

chased. Provision is made for a separate stop bar
* * *."

3. "The use of a register support, *though not in the position and with all of the advantages shown in the George patent*, is taught in Bradley * * *."

4. "the arcuate movement of *the turntable conveys the articles transversely away from the customer and towards the checker. This tends to bring the articles within easy reach and vision of the checker and his conveniently located cash register. It also operates to reduce the likelihood that articles will be inadvertently or fraudulently passed by without checking.*"

5. "The prior art *which comes closest to having the same advantages is the Bradley patent* * * * to the extent that this is done (in Bradley) *the articles will come to a stop at a place which is less convenient for the checker.*"

6. "* * * we have described these check stands in general terms. Both appellants and appellees *will be able to suggest claimed advantages and disadvantages called to our attention* * * * (foot note). Appellants, for example, also contend that the discharge counter coacts in a novel manner with the register support panel."

7. "It is at once apparent, and the appellees concede, that *the George checkstand is useful. The completeness with which appellees have imitated the essential features of the George device is probably indicative of its superior qualities.*"

8. "To be sure, they (the components of the George check stand) *perform this same function differently, and perhaps better.*"

9. Notable by its absence is any finding that the prior art either teaches or suggests the combination claimed.

Appellants believe themselves justified in assuming from these comments that the Court has found that the George check stand is novel and that it provides conveniences and advantages (Fact 3) not provided by the closest prior art and is therefore an improvement over the prior art (Fact 5). Moreover, these advantages result from the novel relationship of the components of the George check stand and novel coaction between those components which causes them, acting in concert, to perform a generally old function in a specifically different and better manner (Facts 7 and 8). Affirmative anticipation by teaching of the prior art is ruled out by fact, or absence of Fact 9.

It is here pointed out that while the major components of the check stand, i. e., the turntable, discharge counter, and register support are generally old mechanisms as found by the Court; they are not and cannot be combined in their old form to achieve these novel results and advantages. The register support of Bradley would have to be modified to permit the turntable to rotate under its top panel and the square ended discharge counters of the prior art would have to be modified to conform to the periphery of the turntable. Thus the finding of a new combination necessarily includes a recognition, even though not expressed by the Court, of specifically novel details in components of the George check stand. This is submitted to constitute a recognition that there is specific novelty in detail and therefore overall novelty of the parts or components that were modified from their prior art form to make them workable in the new combination of George.

INVENTION IS MATTER OF LAW

As noted by the Court in its opinion, the question of whether or not a change in structure which results in different or additional functions constitutes an invention is a matter of law. The Court itself cites authority for this.

TEST OF INVENTION

What then is the test to be applied upon the facts found above? The Court has cited *The Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 147, 155. Bearing in mind that many factors commonly considered as necessary elements of a finding of invention and patentability are not in issue in this petition, the essential parts of the Supreme Court decision in the Supermarket case are submitted to be as follows:

“The mere aggregation of a number of old parts or *elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention.* * * * The conjunction or concert of known elements must contribute *something*; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable * * * but this is not a usual result of uniting elements old in mechanics. * * * Neither court below has made any finding that old elements which made up the device perform any additional or different function in the combination than they performed out of it. * * * A patent for a combination which only unites old elements with no change in their respective functions * * * obviously withdraws what already is known into the field of its monopoly * * *. The courts below concurred in finding that every element here

claimed * * * was known to the prior art. When for the first time, those elements were put to work *for the supermarket type stores, although each performed the same mechanical function* for them that it had been known to perform, they produced results more striking, perhaps, than in any previous utilization * * * but scores of progressive ideas in business are not patentable, and we conclude on the findings below (each element performing only its old function) that this is not one."

The Court also cited *General Electric Co. v. Jewel Co.*, 326 U. S. 242, 249. The relevant portions of the decision in that case, with emphasis added are submitted to be as follows:

"* * * the characteristic feature of the patented bulb is the fact that the interior surface is 'characterized by the presence of rounded as distinguished from sharp angular crevices.' It is that feature which is responsible for the bulb's strength. Now, *an electric bulb frosted on the inside was old in the art.* * * * Moreover, *it had long been known in the art that successive acid treatments of glass rounded out the sharp angular crevices* produced by the first etching. * * * in 1912 (prior art) *specifically described the application of successive etchings to electric bulbs.* * * * Wood (prior art) observed that successive acid treatments of glass rounded out the sharp angular crevices * * * and is useful for rendering lightbulbs (outside) of incandescent lamps diffusing * * * *Pepkin (patent in suit) found latent qualities in an old discovery and adopted it to a useful end* * * * *more than a new advantage of the product must be discovered* * * *."

The Jewel case last cited is least applicable to the present case and will be disposed of first. There all elements were old; outside and inside frosting of lamp bulbs, double

etching of glass generally and specifically to the outside of bulbs. The patentee merely substituted an old process (double etching) for another old process (single etching) on the inside of lamp bulbs. *The double etching did nothing new on the inside that it had not done on the outside of the bulb.*

In the present case not only are the old elements identified as the register support and discharge counter modified to fit in the new combination but a new coaction between them and the turntable and a new result therefrom have been recognized. To paraphrase the end of the last paragraph of the Supreme Court's decision, *more than a new advantage* of an (old) product *has been discovered*. The patentee George did more than perceive a new quality in an old product. For instance, George did not claim the old Bradley register support without change as Pepkin claimed the old double etch process simply because he, George, had recognized a latent but already present attribute of it. George devised a *modification* as well as a novel recombination of the old register support and arrived at a new combination producing a new result which was more than merely adding one old result to another. This, the Court has recognized. As far as the Jewel case is concerned the instant patentee has met the prescribed test and rather than supporting this Court's decision, the Jewel case refutes the decision and requires a reversal of the trial court.

The Supermarket case sets up the now famous test of 2 plus 2 equaling more than 4. This is really no more than the previously required test of a new and unsuggested coaction and cooperation between the elements of the combination. As has been pointed out above under "FACTS", this Court has already found such coaction and cooperation by its observations that: "the support panel

may also perform the *additional function* etc.” and “a register support *though not in the position and with all the advantages* shown in the George patent is old”, and the quoted statements relating to “new functions”, “more conveniences” and “superior qualities”. Where the Supreme Court based its decision in the Supermarket case on the fact that:

“Neither court below has made any finding that old elements which made up the device perform *any additional or different function* in the combination than they performed out of it.”

This Court has found and stated these “additional and different functions”.

It is respectfully submitted that the portions of the Supermarket decision quoted above at page (2) affirmatively require a reversal of the finding of no invention.

The error in this Court’s reasoning is submitted to lie in the detailed comparison and relative evaluation of the merits of the checkstand in suit and the prior art belt type stands. The Court compares relative conveniences under favorable and unfavorable circumstances and then attempts to establish some intangible minimum level or degree of improvement as a prerequisite for patentability and validity. The Court’s consideration of operators’ habits relative to use of the patented device is in itself error because if the patent provides an advantage under any condition the patentee is entitled to protect that advantage and no transient and variable human action removes the continuing availability of the advantage. The Court gives no test nor states any criteria for this hypothetical level. There is no authority or precedent for any such “level” in the Supreme Court decisions. The Supermarket case says only that there must be “some” improve-

ment and that the combination must contribute "something". Then provided that this "something" is the result of intercoaction and new cooperation, the question of patentability is answered affirmatively.

Not only is the test applied by this Court not supported or authorized but it would be ineffective and illogical from the standpoint of public policy. It would throw still another intangible and indefinite test or requirement into the already indefinite problem of determining patentability. The proposed question of "sufficient importance" is in the same category as "when is a string long or a knife sharp?". The answer can only be found in the mind of the judge and then could vary with each judge who might consider the case.

The test of relative importance is based on unstable ground in that it incorporates the variable factors of time and entirely separate economic and material developments. That is, an advantage which may appear small today may become very important tomorrow due to a scarcity of materials or labor. Vice versa, a major advantage today could become insignificant tomorrow. Under the reasoning of the Court's opinion no finding for or against a patent would be final because any party could logically apply for, and obtain from the same judge who ruled originally, a reversal of the original ruling based on different economic conditions.

The public would be seriously damaged by its inability to predict with any degree of certainty what patents would be sustained and litigants would gravitate to the court with a judge having a reputation as having a high or low level sense of the importance of developments, depending on the litigant's purpose.

An even more serious result of the adoption of such a test would be a definite reduction in the national creative effort as individual inventors and corporate research organizations relaxed or discontinued their efforts in the face of inability to protect any but developments of the greatest magnitude. In this way the very purpose of the patent system which is to bring to light meritorious developments would be defeated. It is submitted to be fair to state that major developments are based on many relative minor ones and if we stifle the minor developments, we stifle the major ones. Few individuals and certainly no private research organization would be willing to disclose and in effect give away developments which had cost large sums of money. Why should company X spend to achieve what may be found to be a relatively small improvement when company Y can pick up the improvement for nothing? The result would be that neither company would spend much on new development and the public could just get along on what was already available.

Nor is the adoption of this Court's test of "minimum level of importance" necessary to protect the public. The established test of new coaction of elements and of an end result greater than the sum of the results of the components of the combination fully protects the public. The requirement in the Supermarket case that the new combination contribute "something" assures that the public gets something it did not have before, be that "something" great or small. The economic law of supply and demand can regulate much more accurately than any tribunal and if the "something" contributed by any inventor is of little significance the public simply will not pay for it.

The admonition of the Supreme Court in the Supermarket case that all meritorious developments are not patentable is not a requirement that the scope or im-

portance of a development must meet some minimum level to be patentable. On the contrary, it points out that even a relatively high level of economic development may not be invention and that the test of invention is not the extent of the achievement but the oft repeated contribution of "something" more than the sum of its parts.

In the Supermarket case the Supreme Court points out that a patent, invalid for lack of invention, would withdraw from the public the right to use old elements in all the ways in which the public knew and had a right to use the elements and this is unquestionably true. But if, under the test of contributing "something" the patentee has shown something, however small, that the public could not do before, a patent on that something takes nothing from the public. They can still do everything with all elements of a combination which they knew how to do before the patent. Assuming as we must a properly worded patent defining the invention, the only thing they can't do is put those elements together in the new way taught for the first time by the patentee. In fact, the public gains because in return for the grant of the patent they learn a new way to get additional benefits from old elements.

SUMMARY

Applying the foregoing comments to the facts of this case, as stated by the Court, we find that the patentee George not only combined a turntable, a cash register support and a discharge counter in a new way but in so doing modified both the discharge counter and the cash register support to obtain a new combination. In that new combination the register support was in a new position and had new advantages (something in addition to the

old function of old register supports). The turntable did more than rotate articles in an arc, it advanced them transversely across the end of a discharge counter to the side of the register support and away from the customer. The discharge counter while it still performed the old function of receiving checked articles, by reason of its modification performed the added function of receiving the articles from the turntable at a point closely alongside the register support.

As a bare minimum the extra added functions, over and above the previously known functions of the components of the check stand, achieved advantages of easier viewing and checking, and less likelihood of articles being missed. The relative level of the economic value of these advantages over prior belt stands may be debated but without argument some advantage was obtained and "something" new was contributed and it was achieved by new cooperation of parts.

The Supreme Court cases cited by the Court require the contribution of "something" by a new coaction and cooperation between the parts of the combination which is more than the sum of the old functions of those parts and this contribution of "something" by new cooperation of parts, resulting in more than the sum of old functions has been stated by the Court to exist in this case.

Neither the Jewel case or the Supermarket case establish, require or authorize a test based on a minimum value or level of improvement over the prior art, provided of course that the prerequisite of some contribution through a new coaction is present. None of the patent cases decided recently by this Court have employed such a test.

It is, therefore, respectfully submitted that the Courts decision in this case is based on an improper test and application of the law applicable to the facts as found by the Court, and that the decision of the Court should be withdrawn. Granting of appellants' Petition for Rehearing is accordingly requested.

Respectfully submitted,

EARL and WEBB,
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FRED H. MILLER,
Of Counsel.

CERTIFICATE OF COUNSEL

Under the provisions of Court Rule 23, Austin A. Webb, counsel for appellants in the above entitled action hereby certifies that in his judgment the petition of appellants for rehearing filed herewith is well founded in fact and in law and that it is not interposed for delay.

AUSTIN A. WEBB,
Counsel for Appellants.

Kalamazoo, Michigan,
February 26, 1959.

No. 15,855

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WM. T. ALVARADO SALES Co. and SPEE-DEE CHECKOUT
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Appellants,

vs.

DU-MORE FIXTURE Co., INC.,

Appellee.

BRIEF OF DEFENDANT-APPELLEE DU-MORE FIXTURE CO.

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FILED

JUL 23 1958

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TOPICAL INDEX

	PAGE
Introduction	1
Summary of argument.....	4
Argument.....	6
I.	
The George patent No. 2,599,909 is clearly invalid.....	6
A. The nature of the patent in suit.....	6
B. The mode of operations shown by the device disclosed by the claims.....	7
C. The validity of such a patent is governed by the law laid down in the A. & P. case and its progeny.....	10
D. No principles of law cited by the appellants avoid the impact of the above rigid requirements.....	14
E. There is no new coercion of parts or new results.....	18
F. Even if there is new coercion between the turntable and the register support, the claims are void for over- claiming	28
II.	
In any event claims 3, 5, 6 and 7 of the George patent are not infringed by defendant Du-More's check-out stand.....	32
A. The structure and operation of the Du-More stand should be accurately stated.....	32
B. The first inquiry on the question of infringement is to construe the claims of the George patent in the light of file wrapper estoppel.....	34
C. When so construed, claims 3, 5, 6 and 7 of the George patent must be severely limited.....	36
D. The record shows that there is no infringement of any claim	38
E. Summary on infringement.....	42
Conclusion	43

TABLE OF AUTHORITIES CITED

CASES	PAGE
Air Devices, Inc. v. Air Factors, 210 F. 2d 481, 100 U. S. P. Q. 296	39, 40, 42
Bergman v. Aluminum Lock Shingle Corp. of America, 251 F. 2d 801, 116 U. S. P. Q. 32.....	10, 12, 13
Berkeley Pump Co. v. Jacuzzi Bros., Inc., 214 F. 2d 785, 102 U. S. P. Q. 100.....	12
Butcher Boy Door Co. v. Phillips Products Co., 144 Fed. Supp. 331, 110 U. S. P. Q. 517.....	30
Container Corp. of America v. M. C. S. Corp., 250 F. 2d 707, 116 U. S. P. Q. 7.....	12, 15, 16
D & H Electric Co. v. M. Stephens Mfg., Inc., 233 F. 2d 879, 110 U. S. P. Q. 469.....	36, 37
Delco Chemicals, Inc. v. Cee-Bee Chemical Co., Inc., 157 Fed. Supp. 583, 115 U. S. P. Q. 403.....	18
General Electric Co. v. Jewel Incandescent Lamp Co., 326 U. S. 242, 67 U. S. P. Q. 155.....	16
General Electric Co. v. Wabash Appliance Co., 304 U. S. 364, 37 U. S. P. Q. 466.....	30
Goldman v. Bobins, 245 F. 2d 840, 114 U. S. P. Q. 137.....	18
Gratiot v. Farr Co., 237 F. 2d 940, 111 U. S. P. Q. 170.....	12
Graver Mfg. Co. v. Linde Co., 336 U. S. 271, 80 U. S. P. Q. 451	30, 31
Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corporation, 179 F. 2d 636.....	15
Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U. S. 147, 87 U. S. P. Q. 303....	10, 11, 12, 13, 29, 31
Hall v. Wright, 240 F. 2d 787, 112 U. S. P. Q. 210.....	14
Hines v. Chadwick, 100 F. 2d 100, 95 U. S. P. Q. 59.....	12
Hunter Douglas Corp. v. Lando Products, 214 F. 2d 372, 102 U. S. P. Q. 430.....	13

I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429.....	38
Jacuzzi Bros. v. Berkeley Pump Co., 191 F. 2d 632, 91 U. S. P. Q. 24.....	12, 14, 30
Jeoffrey Mfg., Inc. v. Graham, 219 F. 2d 511, 104 U. S. P. Q. 262	36
Kwikset Locks v. Hillgren, 210 F. 2d 483, 100 U. S. P. Q. 289	12, 38
Leishman v. General Motors Corporation, 191 F. 2d 522, 91 U. S. P. Q. 190, cert. den. 342 U. S. 943, 92 U. S. P. Q. 467, rehrg. den. 343 U. S. 921, 343 U. S. 952.....	14
Lektophone Corporation v. Rola Co., 282 U. S. 168, 7 U. S. P. Q. 107.....	38
Lewis v. Avco Mfg. Corp., 228 F. 2d 919, 108 U. S. P. Q. 147	34, 36
Maulsby v. Couzevoy, 161 F. 2d 165, 73 U. S. P. Q. 249, cert. den. 332 U. S. 791, 75 U. S. P. Q. 365.....	14
Moist Cold Refrigerator Co. v. Lou Johnson Co., 249 F. 2d 246, 115 U. S. P. Q. 160.....	10
Montgomery Ward & Co., Inc. v. Rogers, 100 F. 2d 721, 40 U. S. P. Q. 138.....	38
Muench-Kreuzer Candle Co., Inc. v. Wilson, 246 F. 2d 624, 114 U. S. P. Q. 203.....	12
Oriental Foods, Inc. v. Chun King Sales, Inc., 244 F. 2d 909, 113 U. S. P. Q. 404.....	12, 14, 24
Photochart v. Photo Patrol, 189 F. 2d 625, 90 U. S. P. Q. 46....	13
Ralph N. Brodie Co. v. Hydraulic Press Manufacturing Co., 151 F. 2d 91, 66 U. S. P. Q. 396.....	14
Refrigeration Engineering v. York Corporation, 168 F. 2d 896, 78 U. S. P. Q. 315, cert. den. 335 U. S. 859, 79 U. S. P. Q. 455	14
Schmeiser v. Thomasian, 227 F. 2d 875, 106 U. S. P. Q. 213....	14

	PAGE
Schriber-Schroth Co. v. Cleveland Trust Co., 311 U. S. 211, 47 U. S. P. Q. 345.....	35
Simons v. Davidson Brick Co., 106 F. 2d 518, 43 U. S. P. Q. 297	38
Smith v. Magic City Kennel Club, Inc., 282 U. S. 784, 8 U. S. P. Q. 123.....	35
Stauffer v. Slenderella Systems of California, 254 F. 2d 127, 115 U. S. P. Q. 347.....	14, 15, 16, 18
Steffan v. Len A. Maune Co., 234 F. 2d 750, 110 U. S. P. Q. 7	36
Thabet Mfg. Co. v. Koolvent Metal Awning Corp., 225 F. 2d 207, 107 U. S. P. Q. 61.....	36
Thys Company v. Anglo-California National Bank, 219 F. 2d 131, 104 U. S. P. Q. 230.....	13
United Carbon Co. v. Binney & Smith Co., 317 U. S. 228, 55 U. S. P. Q. 381.....	30
Winslow Engineering Co. v. Smith, 223 F. 2d 438, 106 U. S. P. Q. 209.....	30, 31

STATUTES

United States Code Annotated, Title 35, Sec. 33.....	30
United States Code Annotated, Title 35, Sec. 112	30, 41

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BRIEF OF DEFENDANT-APPELLEE DU-MORE FIXTURE CO.

Introduction.

We agree with the appellants that "These cases raise the traditional issues of patent infringement case" (App. Op. Br. p. 3),* namely, the alleged validity of the patent

*For convenience the following abbreviations are used in this brief:

App. Op. Br. for Appellants' Opening Brief.

R. for the printed Transcript of Record. All page references are to the printed pagination.


Unless otherwise indicated, italics have been added to all quotations.

in suit and the alleged infringement of the accused devices. The simplicity of the statement of the issues, however, cannot serve to suppress the details of the evidence. That is, the contention of the appellants that there are both validity and infringement in this case as a matter of law (App. Op. Br. pp. 3, 33, 42-46) is simply divorced from the true facts in the record: Appellants' Opening Brief omits to record the evidence which is adverse to their contentions and distorts the evidence which it purports to recount.

The more important of the omissions and distortions will be specifically pointed out hereafter. Suffice it to say here (with particular reference to the Specifications of Errors, App. Op. Br. pp. 4-6) that there was no "*admitted* novelty of the patented device"; no "*admitted* insufficiency of the prior art to teach or suggest the combination of elements in the patented device"; no "*uncontroverted* evidence of novel coercion between the elements of the patented device"; no "*admitted* utility and improved action of the patented device"; no "*admitted* fact that the accused devices utilize the same concept of operation as the patented device for the same purpose as the patented device"; no "fact that the accused devices each included all of the elements defined by one or more claims of the patent in suit."¹

¹The italics are the appellants', and the listing in the text of statements of alleged facts in appellants' Specification of Errors which we dispute is not intended to be all-inclusive of the erroneous statements there. *E. g.*, also erroneous is the statement in specification 11, App. Op. Br. p. 5, "that the problem solved by the patent in suit had long been recognized by the trade and that in spite of this no one prior to the patentee had been able to conceive or devise the simple solution thereof as disclosed by the patentee." The alleged "problem" is how to speed up check-out of items purchased by customers at a "supermarket," which is stated to be "a matter of judicial record" and of long standing. (App. Op.

On the contrary, and by way of example, defendants always contended that the George patent was an unpatentable aggregation [*e. g.*, Par. XXII, R. 23, 44], and even the plaintiffs admitted that "*The parts are old, admittedly, but they are brought together in a novel action, as we intend to show.*" [R. 40; see also R. 42.] The only "admission" of the defendants was that "in a check stand George was the first one that put a panel over a quadrant of the turntable." [P. 458 of original Transcript of Proceedings in the District Court, reproduced in Appx. p. XVI of App. Op. Br.] This is not an admission of novelty of the patented device, nor of invention, nor of novel coaction. Beyond that, the "admission" is not coextensive with the reach of the claims of the George patent. The claims do not stop with merely calling for a turntable and a register support panel; they also include as an essential element a discharge counter, and as will be shown are invalid for overclaiming if for no other reasons. (See argument *re* overclaiming, *infra*.) Defendants consistently urged the invalidity of the George patent for overclaiming. [*e. g.*, R. 241.]

Br. p. 6.) The record in this case, however, contains mechanical conveyor type check-out stands long predating the patent in suit, *e. g.*, Muse patent No. 2,237,080, Bradley patent No. 2,317,438. The testimony was categorical that there was no substantial difference in checkout time through use of a belt-type conveyor compared with a turntable type conveyor. [R. 231.] Significant improvement of checkout time is obtained by mechanical over non-mechanical check stands, but not by one mechanical type over the other. [R. 231 and see text *infra*.] Mechanization of check-out stands, through inclusion therein of art from the field conveyors, was accomplished by Muse and Bradley at least twelve years before issuance of the patent in suit. 

Similarly, we do not pause now to comment in the text on the appellants' gratuitous assumptions as to what the trial Court allegedly failed to recognize and consider (*e. g.*, specifications 9 and 10). The case authorities showing the emptiness of these specifications are gathered hereafter in the argument.

Similarly, as a further introductory example, defendants denied with particularity that their device utilizes "the same concept of operation as the patented device." Thus, the testimony was categorical that the means of operation in defendant Du-More's device is an electric eye which halts movement of the turntable itself, and, as a consequence, stops the movement of the items which are on the turntable. There is no "stop portion"² of a register support in Du-More's device against which the articles will bump and come to rest: In Du-More the turntable is stopped, in plaintiff's claims the items, but not the turntable, are halted by a stop portion. [See generally R. 131-132.] This is a significant difference. In addition, the Du-More discharge counter has a straight edge [R. 133, 135], not one concavely arcuate with respect to the support panel. (Claim 3.) Nor is defendant's register support panel supported adjacent to the discharge counter [R. 138], as is the specification in Claim 5.

Further contentions of the defendants, the verity of which was proved by the evidence in the record, will be detailed hereafter.

Summary of Argument.

Although appellants have included thirteen "specifications of error,"³ we think it fair to say that their brief first argues that the George patent is a valid patent and

²Claim 3 of the George patent in suit. See also claims 6 and 7—"means forming a stop for articles on the receiving table" and "a side edge . . . to form an article stop for articles rotated thereagainst by said receiving counter."

³Some of these, we point out, cannot fairly be included in the "Appellants' Statement of Points to Be Relied Upon" [R. 243], but to the extent they are developed in appellants' brief we will answer them nevertheless.

then argues that defendants' devices infringe. Our argument, similarly, will first discuss the question of validity. Under this heading, the nature of the patent in issue as an unpatentable aggregation and the law governing aggregations will be set forth. The most recent opinions of this Court will be gathered to show that the George patent is not directed to an invention. Specific portions of the record will be cited to show that there are no new results, no marked increased efficiency, and no new coercion sufficient to support the patent. The prior art will be analyzed to show that all elements of the George patent are old and that the George patent was clearly anticipated thereby.

Our argument as a matter of excess caution will then develop that even if there is patentable invention somewhere in the device disclosed by the George patent, the claims in issue are invalid for overclaiming or vagueness.

Secondly, our argument will demonstrate that regardless of its validity the George patent is not infringed by the Du-More device. Under this heading the George patent will be analyzed in the light of file wrapper estoppel, a matter on which appellants' opening brief is significantly silent, though the matter was briefed at length in the trial court. When so analyzed, claims 3, 5, 6 and 7 of the George patent must be severely limited. Specific portions of the record will be cited to show that there is no infringement of any claim.

ARGUMENT.

I.

The George Patent No. 2,599,909 Is Clearly Invalid.

A. The Nature of the Patent in Suit.

(Ref. App. Op. Br. pp. 8-23.)

There is no dispute that this is a patent composed of elements all of which are old in the prior art. At the very inception of the trial the following colloquy occurred:

“The Court: Is there anything new in any of this apparatus? You have taken various items that have been in the public domain and combined them in something that you claim is new, but is there anything new?”

Mr. Webb: No.

The Court: Is there any part that is new, any claim of anything new?

Mr. Webb: Broadly speaking, your Honor, we do not claim any specific item is absolutely new and cannot be found in the prior art. We claim that the combination is new in this art and that it gets a new and un-obvious result, as we will show.” [R. 42.]

(We deal hereafter with the alleged improvement and un-obvious result to show they are not in fact present.)

The record was thereafter made specific by defendants to show the presence of all the elements in the prior art. A turntable is shown by the Price patent No. 2,268,897. [R. 391.] A moving surface to bring items to a checker in a store is shown by the Bradley patent, No. 2,317,438 [see Figs. 10 and 11 thereof; R. 404] and by the Muse patent, No. 2,237,080. [R. 387.] A cash register support adjacent to and to the right of where the articles may be taken by the checker is shown by the Turnham patent,

No. 2,242,408 [R. 416], by the Bradley patent, No. 2,317,438 [R. 404], and by the Muse patent, No. 2,237,080. [R. 387.] A “discharge counter” is shown by the same three patents last cited. Mechanization of the moving surface “receiving table” is shown in both Bradley and Muse in check-out stands and in the Price turntable in the food products industry. The Price device also shows a bar similar to a stop portion.

A careful reading of pages 8-23 of Appellants’ Opening Brief shows that appellants do not seriously controvert the above facts. Their argument rather is that there is novel interrelation and coaction of parts. Preliminary to discussing that argument, however, it is necessary to set out the actual record concerning the “mode of operation” of the check-out stands. (See App. Op. Br. pp. 11-12.)

B. The Mode of Operation Shown by the Device Disclosed by the Claims.

Appellants explain the mode of operation of the device by reference to their Exhibit 9. (App. Op. Br. p. 11.) It is important for the Court to realize that said exhibit was never represented as accurately reflecting *in scale* the devices in issue.⁴ Nor was there any testimony concerning a constant position or point at which the customers’ carts approach the stand, though it is of course true that customers generally approach the front of the checkstand rather than the side.

The customers load their items of purchase on the turntable, and place the items all over the surface thereof. not

⁴Appellants write: “Note that defendant appellees’ expert acknowledged the accuracy of the original exhibit at R. pp. 216-217.” (App. Op. Br. p. 11.) As the record shows, he acknowledged merely that the dotted arrows “accurately indicate the direction of motion of the articles relative to the checker.” [R. 217.]

merely at the periphery. [R. 106-108.] The intended operation of the device revealed by the George patent appears to be that the turntable will be in rotation only while activated by the checker [R. 114-115], who maintains in engagement a "hip switch" [R. 58, 96] or a foot pedal switch. [R. 96 and Item 24 in Fig. 1 of George patent, R. 250.]⁵ The turntable then rotates in a counter-clockwise direction, bringing the articles around and then towards the cash register support panel. Most articles will be brought to a position handy to the checker, but it is important to realize that items placed near the center of the turntable or significantly inward from the periphery of the turntable do not come within the deceptively easy reach of the checker depicted by Plaintiffs' Exhibit 9, and that said exhibit does not purport to be in scale to the actual physical reach of the checkers or to the comparative sizes of turntables and conveyor belts.⁶ In fact experienced checkers may have to reach a substantial distance for various items on appellants' device. For example, on cross-examination plaintiffs' witness Mrs. Kenney, a checker, testified in part as follows:

Q. With respect to the box of crackers you just picked up, the last item, that was near the center of the turntable, wasn't it? A. Yes.

Q. You had to reach a substantial distance across the turntable to pick that up? A. That is my habit. I check that way.

Q. But that is what you did, is that correct? A. Yes." [R. 60.]

⁵In contrast, the intended operation of defendant Du-More's device is that it be in constant rotation except when an item has interrupted the electric eye beam and thus broken the circuit. [R. 121.]

⁶The turntable made by plaintiffs is about 24 inches in radius. The usual conveyor belt is 18 inches or less. [R. 109.]

Regardless of whether the checker has to reach an uncomfortable distance for the items, in actual operation of plaintiffs' device there is a constant moving of the checker's head back and forth from the keys of the register to the surface of the counter. [R. 52, 59. "You have to look *both* places when you are checking."]

Further, the interruption of the items on the turntable by the checkers varies with the individual preference of the checker. The checker may pick up the item a considerable distance from the register, or may permit the items to come close to the register. The items may or may not be brought against the register support panel. [R. 58, 64-65, 89, 96, 198. See also testimony that operators have different preferred positions for the cash registers themselves. R. 75.] The checker operates the cash register with the right hand to record the price of the item and with her left hand she moves each item generally rearward from the turntable to the discharge counter.

When it is realized that the majority of belt type conveyors are eighteen inches or less in width [R. 109], and that items are placed all across said width [R. 107], and when it is realized that the operation of the plaintiffs' device is as above stated, it is apparent that, generally speaking, the items on a turntable type of check-out stand are brought to the same general position for check-out adjacent to the left of the checker as they would have been if transported from the front of the check-out stand towards the discharge counter by a conveyor belt; and that on both types of stands the items are "checked" on the cash register by the checker and then manually pushed or placed on the discharge counter in the same way.

C. The Validity of Such a Patent Is Governed by the Law Laid Down in the A. & P. Case and Its Progeny.

Especially in the light of the opinions of this Court within the last year, we would be carrying coals to Newcastle if we expounded at length “the rigid standards of invention of *Lincoln Engineering Co. v. Stewart-Warner Corp.*, *supra* [303 U. S. 545], and *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, *supra* [340 U. S. 147]; . . .” *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F. 2d 246, 252, 115 U. S. P. Q. 160, 166. This Court, and the trial courts of this Circuit, “are committed” to those rigid standards. (*Ibid.*) Most recently these standards have been elaborated in *Bergman v. Aluminum Lock Shingle Corp. of America*, 251 F. 2d 801, 116 U. S. P. Q. 32.

We therefore quote only the following extract from the *A. & P.* case, *supra*:

“The negative rule accrued from many litigations was condensed about as precisely as the subject permits in *Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U. S. 545, 549 (37 U. S. P. Q. 1, 3): ‘The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention.’ To the same end is *Toledo Pressed Steel Co. v. Standard Parts, Inc.*, 307 U. S. 350 (41 U. S. P. Q. 593), and *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U. S. 84 (51 U. S. P. Q. 272). The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable. Elements may, of course, especially in chemistry or

electronics, take on some new quality or function from being brought into concert, but this is not a usual result of uniting elements old in mechanics. This case is wanting in any unusual or surprising consequences from the unification of the elements here concerned, and there is nothing to indicate that the lower courts scrutinized the claims in the light of this rather severe test.

“Neither court below has made any finding that old elements which made up this device perform any additional or different function in the combination than they perform out of it. This counter does what a store counter always has done—it supports merchandise at a convenient height while the customer makes his purchases and the merchant his sales. The three-sided rack will draw or push goods put within it from one place to another—just what any such a rack would do on any smooth surface—and the guide rails keep it from falling or sliding off from the counter, as guide rails have ever done. Two and two have been added together, and still they make only four.” (340 U. S. 147, 152-153, 87 U. S. P. Q. 303, 305-306.)

In the present case, as will be shown in detail in Part E hereafter, there is not within the meaning of the *A & P* case any different coaction between the various elements in the George device from the coaction of the elements in the prior art. The receiving counter or turntable in George has the same function as the belt in Muse and Bradley; the discharge counter in each serves the same function; and the coaction between the turntable and the discharge counter in George is precisely the same as the coaction between the belt and the discharge counter in Muse and Bradley. [R. 105-106, 191, 232-233.]

In the *A & P* case the Supreme Court's mandate was stated as follows:

"Courts shall scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements." (340 U. S. 147, 152, 87 U. S. P. Q. 303, 306.)

In accordance with that mandate, patents far more colorable than the George patent have been held invalid by the Courts. The following is just a partial list of recent Ninth Circuit cases invalidating combination or aggregation patents:

- Bergman v. Aluminum Lock Shingle Corp. of America*, 251 F. 2d 801, 116 U. S. P. Q. 32 (9 Cir., 1957);
- Container Corp. of America v. M. C. S. Corp.*, 250 F. 2d 707, 116 U. S. P. Q. 7 (9 Cir., 1957);
- Muench-Kreuzer Candle Co., Inc. v. Wilson*, 246 F. 2d 624, 114 U. S. P. Q. 203 (9 Cir., 1957);
- Oriental Foods, Inc. v. Chun King Sales, Inc.*, 244 F. 2d 909, 113 U. S. P. Q. 404 (9 Cir., 1957);
- Kwikset Locks v. Hillgren*, 210 F. 2d 483, 100 U. S. P. Q. 289 (9 Cir., 1954);
- Gratiot v. Farr Co.*, 237 F. 2d 940, 111 U. S. P. Q. 170 (9 Cir., 1956);
- Himes v. Chadwick*, 100 F. 2d 100, 106, 95 U. S. P. Q. 59, 63 (9 Cir., 1952);
- Berkeley Pump Co. v. Jacuzzi Bros., Inc.*, 214 F. 2d 785, 102 U. S. P. Q. 100 (9 Cir., 1954).
- Jacuzzi Bros. v. Berkley Pump Co.*, 191 F. 2d 632, 91 U. S. P. Q. 24 (9 Cir., 1951);

Photochart v. Photo Patrol, 189 F. 2d 625, 90 U. S. P. Q. 46 (9 Cir., 1951);

Hunter Douglas Corp. v. Lando Products, 214 F. 2d 372, 102 U. S. P. Q. 430 (9 Cir., 1954);

Thys Company v. Anglo California National Bank, 219 F. 2d 131, 104 U. S. P. Q. 230 (9 Cir., 1955).

It is not surprising that the above cases and standards are not discussed by appellants. It is surprising that they would contend that as a matter of law there is invention. This connection is disposed of alternatively:

Conclusion
(a) If invention, on this record, can be held to be a question of law rather than fact, it is clear that under the *A & P* case and *Bergman v. Aluminum Lock Shingle Corp. of America*, 251 F. 2d 801, 116 U. S. P. Q. 32 (9 Cir., 1957), this Court must rule that invention is lacking.

(b) To the extent that the record permits invention in this case to be an issue of fact (*e. g.*, if reasonable minds might differ as to whether the aggregation is suggested by the prior art or easily deduced therefrom, or because of testimony relating to degree of alleged improvement of plaintiffs' device over other types of check-out stands),⁷ the trial court has resolved the factual question and has held that there is no invention. This finding of fact will not be disturbed by this Court.

⁷We point out, however, that the comparisons of alleged improvement relied on by the appellants were of the turntable type of check-out stand over non-mechanical types of stands. Plaintiffs' witness McNeil claimed generally that the turntable was more efficient than other types of stands, but defendant's witness Garth was the only witness who explicitly compared turntable check-out stands with mechanized conveyor check-out stands. Garth testified categorically that there was no improvement in operation between the two. [R. 231.]

As stated in *Stauffer v. Slenderella Systems of California*, 254 F. 2d 127, 129, 115 U. S. P. Q. 347, 349:

“The sole question before this Court is whether the finding of fact by the trial court, that the Stauffer device is not patentable on the ground that it does not involve invention in view of the prior art, is ‘clearly erroneous.’ We conclude that the findings are sustained by the evidence and that the judgment must be affirmed.”

In support of this result this Court also stated in the *Stauffer* case:

“This Court has consistently held that the question of validity of a claim of a patent is one of fact. (citing cases) The findings of a judge upon novelty, utility and invention are entitled to great weight when made after a trial of these issues. This Court will respect such findings unless the record shows these to be ‘clearly erroneous.’” (254 F. 2d 127, 128, 115 U. S. P. Q. 347, 349.)⁸

D. No Principles of Law Cited by the Appellants Avoid the Impact of the Above Rigid Requirements.

1. Appellants seek to derive some comfort from their admission that “The structure of the patent in suit is not

⁸The cases cited for this rule were: *Oriental Foods, Inc. v. Chun King Sales, Inc.*, (9 Cir.), 244 F. 2d 909, 113 U. S. P. Q. 404; *Hall v. Wright* (9 Cir.), 240 F. 2d 787, 790, 112 U. S. P. Q. 210, 212; *Schmeiser v. Thomasian* (9 Cir.), 227 F. 2d 875, 106 U. S. P. Q. 213; *Jacuzzi Bros. v. Berkeley Pump Co.* (9 Cir.), 191 F. 2d 632, 91 U. S. P. Q. 24; *Leishman v. General Motors Corporation* (9 Cir.), 191 F. 2d 522, 91 U. S. P. Q. 190, cert. den., 342 U. S. 943, 92 U. S. P. Q. 467, rehrg. den., 343 U. S. 921, 343 U. S. 952; *Refrigeration Engineering v. York Corporation* (9 Cir.), 168 F. 2d 896, 78 U. S. P. Q. 315, cert. den., 335 U. S. 859, 79 U. S. P. Q. 455; *Maulsby v. Couzevoy* (9 Cir.), 161 F. 2d 165, 73 U. S. P. Q. 249, cert. den., 332 U. S. 791, 75 U. S. P. Q. 365; *Ralph N. Brodie Co. v. Hydraulic Press Manufacturing Co.* (9 Cir.), 151 F. 2d 91, 66 U. S. P. Q. 396.

complex” (App. Op. Br. pp. 8, 33) by arguing that “in fact simplicity is the essence of true invention.” (App. Op. Br. p. 33.) In support of this thesis the report of the Commissioner of Patents for the year 1849 is cited, including therein the authority of the poet Milton. Within the year the identical contention of another appellant before this Court was neatly disposed of as follows in *Stauffer v. Slenderella Systems of California, Inc.*, 254 F. 2d 127, 128, 115 U. S. P. Q. 347, 348-349:

“The argument of appellant is that simplicity is the essence of invention. For this proposition, numbers of cases are cited. But there is a common fallacy here. So common, indeed, that the medieval logicians gave it a name. All inventions may involve simplicity. But simply because a device is simple does not prove that it involves invention. The fact that the trial court indicated that none of the prior patents anticipated the device of Stauffer did not prevent him from considering the progress in the art thereby exemplified to determine whether invention were involved.”

2. Appellants cite the statutory presumption of validity and the fact that the Bradley and Price patents were cited by the Patent Office. (App. Op. Br. pp. 4, 5, 38.)⁹ This clearly cannot save an invalid patent.

Container Corp. of America v. M. C. S. Corp., 250 F. 2d 707, 708, 116 U. S. P. Q. 7, 8 (9 Cir., 1957), and cases there cited.

⁹Significantly, the Turnham, Muse, Goodrich and Florence patents were not made references of record in the file of the George patent. [See App. Op. Br. p. 15, and R. 254.] Significantly, also, appellants in the Patent Office cited the opinion of the Sixth Circuit on the Turnham patent [*Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corporation*, 179 F. 2d 636; file wrapper, p. 48 of George patent in suit; Du-More Ex. B], but not the reversal of that opinion by the United States Supreme Court (340 U. S. 147), though that reversal occurred during the prosecution of George's application.

3. Appellants cite the alleged commercial success of their device and the alleged copying by defendants. (App. Op. Br. pp. 5, 39.) Infringement, of course, is categorically denied, but even assuming that copying is present, neither copying nor commercial success can save an invalid patent.

Container Corp. of America v. M. C. S. Corp., 250 F. 2d 707, 709, 116 U. S. P. Q. 7, 8 (9 Cir., 1957);

Stauffer v. Slenderella Systems of California, Inc., 254 F. 2d 127, 128, 115 U. S. P. Q. 347, 349, and cases there cited.

4. Appellants argue that “the patent in suit is the first to teach the use of a rotatable turntable *in a checkstand* for self service stores.” (App. Op. Br. p. 22; see also p. 42: “No one ever used a rotatable turntable *in a checkstand* before.”) It is admitted, however, that rotatable turntables are old in the conveyor art and in the food packaging industry. [Price patent 2,268,897, R. 391, 236, containing specific admission.] It is also admitted that industrial type conveyors were made part of retail store operations in the Bradley and Muse devices [conveyor belts and rollers; R. 192-193, 404, 387]—before the George patent. The law is clear that the taking over of devices from one field of use to another does not constitute invention. A new use of an old device is not patentable.

General Electric Co. v. Jewel Incandescent Lamp Co., 326 U. S. 242, 249, 67 U. S. P. Q. 155, 158 (1945), and cases there cited.

5. Appellants argue that “the prior art failed to suggest the use of a turntable in the manner disclosed and claimed in the George patent in suit.” (App. Op. Br. p. 23; see also Point 14 in Appellant’s Conclusion, App. Op.

Br. p. 44, 38: “. . . the patents . . . suggested only the positioning of the Price turntable *alongside* of the cash register *but not partially under it.*” Italics by appellants.) Here appellants are both factually and legally incorrect. At R. 180-181 and 186-191 appellees’ expert explained how the turntable of Price would be substituted for the conveyor belt of Bradley and with defendants E series of exhibits [R. 309-315] graphically demonstrated what he had previously summarized in his direct testimony:

“Q. Would you point out the similarities, if any, and the differences, if any, between the Du-More checkout counter, such as shown in Defendants’ Exhibits D-1 and D-2, and the Turnham and the Bradley structures shown in the two patents? A. Well, the structures functionally are the same, with the exception again in the Turnham patent we have an extension which is a loading platform, over which the movable frame moves.

That has been replaced in the Du-More (302) construction by the rotatable turntable, which is a different type of loading platform.

Q. Is there any difference in co-action between the Du-More turntable, the cash register, and the discharge and the register support, and discharge counter shown in the Bradley patent? A. In the Du-More construction and in the Bradley patent, the loading elements comprise a turntable in Du-More and the conveyor belt in Bradley, and both function to convey the purchased material from the loading position to the checking position.

The function of the remainder of the unit is the same in the two cases, and far as I can see, it is merely a substitution of a rotatable turntable for the conveyor belt.” [R. 152-153.]

As to the law, this Court recently stated:

“The fact that the trial court indicated that none of the prior patents anticipated the device of Stauffer did not prevent him from considering the progress in the art thereby exemplified to determine whether invention were involved.

“Anticipation is strictly a technical defense. Unless all of the same elements are found in exactly the same situation and united in the same way to perform the identical function in a prior pleaded patent, there is no anticipation.

“The advances in the prior art may be such that, although there is no strict anticipation and even though the devices involved may not be similar, a trained mechanic would, if presented with the problem, solve it without difficulty. The court found affirmatively that the Stauffer device did not contain invention.”

Stauffer v. Slenderella Systems of California, Inc.,
254 F. 2d 127, 128, 115 U. S. P. Q. 347, 349 (9
Cir., 1957).

See also the discussion by Judge Mathes in *Delco Chemicals, Inc. v. Cee-Bee Chemical Co., Inc.*, 157 Fed. Supp. 583, 590, 115 U. S. P. Q. 403, 407 (S. D. Cal., 1957), and by the Seventh Circuit in *Goldman v. Bobins*, 245 F. 2d 840, 843, 114 U. S. P. Q. 137, 139 (7 Cir., 1957).

E. There Is No New Coaction of Parts or New Results.

In an attempt to avoid the impact of the facts and law stated above in headings “A” through “D,” appellants assert that there is new coaction between the old parts of their device and that there are new results sufficient to show invention. (App. Op. Br. pp. 13, 24, 36.) The

facts in the record and as found by the trial court are otherwise.

We take the paragraphs of pages 13 and 14 of Appellants Opening Brief in sequence:

Paragraph one on page 13 correctly describes the function of the rotatable receiving table but does so only if “the same convenient checking position” is understood to include the broad general area to the left of the register support panel. (See description of Mode of Operation under “B” above.) Items are brought to this “same convenient checking position” by the conveyor belt of Bradley and Muse. That apart, the description in paragraph one, of course, does not attempt to describe any coaction or any new results.

Paragraph two on page 13 in fact shows that the position of the register and of the checker in appellants’ device are identical with the position of the register and of the checker in the check-out stands shown by the prior art, with the difference only that the rotatable receiving table in part is under the register support. (This difference, and its inadequacy to show invention, has been discussed under “D” above.) Despite appellants’ euphemistic choice of language, it should also be pointed out (because of its pertinency to the issue of infringement) that in fact claims 3 and 7 expressly *require* that one portion of the register support panel operate as a stop portion and that claim 6 (claim 20 of application), because of George’s acquiescence in the rejection by the patent office [see pp. 31 and 34 of the file wrapper of 2,599,909, defendant Du-More’s Ex. B] also so requires. There cannot be a plurality of means for these functions under these claims.

Paragraph three on page 13 states the function of the discharge counter, but we do not believe that appellants seriously contend that conformation of the forward end of the discharge counter to the shape of the circular receiving table is a new coaction of parts. Conformation of parts one to the other has not been novel since man made his first structure or device. Rather, the coaction “in a novel manner” is described in the next paragraph, being *paragraph one on page 14*. There appellants state that the front of the discharge counter is within normal reach of the checker, that there is a continuous supporting surface for articles from the stop to the discharge counter, and that the articles can be merely pushed or swept from the checking position to the discharge counter. How “novel” all this is can be gleaned from those parts of the record quoted above and from the following:

The testimony of plaintiffs’ witness McNeil on cross-examination with reference to Plaintiffs’ Exhibits 7-D, 7-E, and 7-F is especially illuminating. [These exhibits show, respectively, a manually operated receiving counter, a belt-type receiving counter, and a turntable receiving counter, each connected with a discharge table..] At R. 105-106 after prior more detailed testimony is the following:

“Q. And in all three devices, the receiving counter, the particular mechanism that might be on the counter, such as the pull bar or pull arm in Exhibit 7-D, for the purpose of conveying articles to the location of the checker, is so she may reach the items with her left hand? A. That is the desired result in all cases.

Q. And in all three cases the checker will lift the articles, usually item by item, with her left hand and move them onto the discharge counter after record-

ing the value on the cash register? A. They are slid or lifted, yes.

Q. Slid or lifted, that's correct. A. Right.

Q. So insofar as that general co-action between the receiving counter and the discharge counter is concerned, and the checker is concerned, the general operation is the same in each of these counters? A. The very general operation, yes."

The testimony of defendants' witness Garth is also illuminating:

"Q. Is there any difference in the function of the discharge counter in the split type of stand shown in Du-More's Exhibit A, and the two-belt type stand shown in Defendant's Exhibit E, and which you have referred to as a disc type of check stand? A. No. They are all made of the same jigs.

Q. Do they all operate the same way? A. They all operate the same way." [R. 233-234.]

That the coaction of the various elements is the same in all the devices is also shown by defendant Check-A-Matic's Exhibits E-1 through E-8, depicting prior patents and devices and combining them to show the George device.

"Q. By Mr. Latta: Mr. Sellers, do you find in each of the stands in Exhibits E-1 to E-8, inclusive, a register support, a conveying device to bring articles to a checking position near the register support, and a discharge counter to receive checked articles where they can be placed in sacks? A. I believe that combination is present in each of these Exhibits E-1 to E-8, inclusive." [R. 191.]

What is said immediately above also disposes of *paragraph two on page 14*. We point out again, however, that the record does not support the statement that movement

of the articles of purchase is interrupted "closely alongside the cash register and immediately adjacent the discharge counter." This statement is true only if the general area to the left of the register support panel is meant thereby—the same general area from which articles will be taken from a mechanized conveyor belt by a checker. The same, of course, is true of the phrase "at the same location."

We now take the paragraphs of pages 24, 25 and 26 of Appellants' Opening Brief in sequence:

Paragraph one on page 24 contains statements which are simply not so. The parties to this suit agreed simply that mechanized check-out stands, both turntable and conveyor belt types, greatly facilitate the checking operation. The figures of a reduction of 25% to 33% in the number of checkstands needed referred to mechanized stands over non-mechanized stands, *not* to turntable stands over belt conveyor type stands.

The only detailed testimony comparing the increased efficiency of the various stands one to the other, and the only testimony specifically showing the source of any percentage increase in efficiency as reflected in the advertisements, was given by defendant's witness Garth. His testimony was as follows:

"Q. Mr. Garth, I notice in this same advertisement, Plaintiffs' Exhibit 30, there is a statement, 'Five Du-More Automatic Check Stands Do the Work of Eight Conventional Check Stands.' Did you have anything to do with composing the language that appears in the ad? A. Not the language. I did give the figures.

Q. To whom did you give the figures? A. To the advertising agency.

Q. To what does the expression eight conventional check stands refer, what type check stands are you referring to there? A. *A non-mechanical check stand.*

Q. By that you mean a non-turntable type? A. Non-turntable or non-belt type check stand.

Q. Would you be referring to a split type of check stand, such as shown in Defendant Du-More's Exhibit A? A. Yes.

Q. *Is there any substantial difference in the check-out time through use of a belt type conveyor, that is the type in which the receiving counter has a belt, such as shown in Defendants' Exhibit E for identification, and the turntable type of check stand?* A. No. The speed is regulated by the movement—or regulated actually by the checker. The movement of merchandise to the checker is usually much faster than she can handle it on the average order.

Q. So in the advertisement, then, the comparison is between a mechanical conveyor type of check stand to convey the articles to the checker's position, and a non-mechanical type? A. Right." [R. 230-231.]

(Even appellants' witness Phyllis Kenney compared the ease of operation of a turntable check-out stand only with a non-mechanical split type stand, not with a mechanized conveyor belt stand. [R. 57.] Appellees' expert stated he did not know the basis of the 30% figure. [R. 173].)

It follows, therefore, that the appellants' Spee-Dee check stand does not represent a marked improvement efficiency-wise over mechanized prior art check-out stands. That it is an improvement over split type stands is, of course, immaterial, as such stands were themselves greatly improved upon by the belt type mechanized stands.

There is, therefore, no basis in fact or law for plaintiffs' argument based on alleged increased efficiency.

(Increased efficiency alone in any event would be insufficient to justify a claim of invention. (*Oriental Foods, Inc. v. Chun King Sales, Inc.*, 244 F. 2d 909, 913, 113 U. S. P. Q. 404, 407 (9 Cir., 1957), and cases there cited).)

The phrase "to the same position immediately alongside of the cash register" in paragraph one on page 24 has been commented on above.

The attempt to prove greater visibility available to the checker, as in said paragraph one, is not supported by the record any more than is the statement on "improved result" and "a reduction of 25% to 33% . . ."

Even if we assume that operators have stiff necks and cannot turn their heads, the shaded portions on the turntable and belt on Plaintiffs' Exhibit 8 (which portions are alleged to be outside of "normal vision") are not significantly different in size. When it is remembered that many checkers pick up the items before they come to rest, the shaded portions must be reduced accordingly. In short, the "area of normal vision" includes the bulk of all items on both the turntable and belt conveyors.

In fact the shaded areas on Plaintiffs' Exhibit 8 must be further corrected by the obvious fact that the operator, even if she did not turn her head towards the counter and had a stiff neck, would not look over the top corner of the register but down at the keys. [See R. 65.]

The alleged "normal line of vision" of a checker, however, is itself a myth. Even plaintiffs' witnesses agreed that proper operation of the check-stand to insure accuracy and safety requires the checker to move her head

back and forth from the keys and the counter. Thus Mr. McNeil testified:

"A. Well, in spite of the fact that we do like cashiers who operate by touch, there are very few of them who are able to operate a machine by touch. It is very difficult, much more so than a typewriter or an adding machine. Because in this business accuracy is so completely important to the customer and to the retail customer, I mean to our customer, and the retail customer, we don't try to get the girls to look away from the machine, and they are operating the machine constantly, perhaps 10,000, actually, rings per day, so that a constant turning, as for example, watching—it is about like watching a tennis game, if you are to go back and forth from the items—having all the operation within or as close as possible to the normal line of vision is definitely a fatigue preventer." [R. 52.]

And Mrs. Kenney, the checker, testified as follows:

"Q. You don't look directly in front of you, you don't face head on into the cash register at all times. You are looking off to your left, isn't that correct?
A. You have to look both places when you are checking.

Q. So you can see the entire area of this turntable? A. Yes.

Q. As a matter of fact, you can see this fixed panel portion to your left of the turntable as well, can't you? You don't have any difficulty seeing that? A. No.

Q. You can actually see from the left half of the panel which supports the register all the way to the left side of the check stand, can't you? A. Yes." [R. 59.]

Paragraph two on page 24 of Appellants' Opening Brief is disposed of by what is said above about "the same convenient checking position," and by our recalling to the Court that Plaintiffs' Exhibit 9 is not to scale on the comparative sizes of turntables and conveyor belts. It can, indeed, be argued that there is better "reachability" on a conveyor belt type stand than on a turntable type, for in the latter the cash register may well impede the checker from reaching towards the center of the turntable.

Paragraph one on page 25 of Appellants' Opening Brief alleges an advantage which we believe is ridiculous on its face. That aside, there is no testimony in the record concerning alleged ease of identification of price. We also believe that this Court can take judicial notice of the fact that items are placed on check-out stands by customers without regard to where the prices thereon are stamped, and of the fact that many checkers in supermarkets register the prices of articles from memory and not from visual inspection of a stamped price.¹⁰

The summary *paragraph two on page 25* has been disposed of by the above comments on the preceeding paragraphs.

The argument in *paragraph three on page 25* is based entirely on the following testimony:

"Q. Has there been any recognized tendency in supermarket operations for the customers to rehandle articles on a belt type check stand? A. If you mean

¹⁰Indeed, most supermarkets provide their checkers with a list of prices which is attached to the register, for prices are changed frequently. When in doubt as to the price of an item, especially where "specials" are common, the checker will refer to her list and not to the price stamped on the item, if, indeed, any price is there stamped. There is, however, no relevant evidence on the "problem" in the record.

by rehandle, if you mean they *touch* them while they are on the stand, yes, there has been a very definite tendency.

Q. Is that an honest or a dishonest tendency?

A. Well, I don't know . . .” [R. 238-239.]

Clearly, this is not testimony that customers slip or move articles past the checker without the article being checked. *There is no testimony in the record* which supports the assertion that with appellants' stand “losses to the store have been greatly reduced.” (App. Op. Br. p. 26.)

Similarly, there is no testimony in the record to support the fanciful and insignificant argument dealing with carts in *paragraph one on page 26*. Beyond that, the description there is not in the claims nor anywhere in the George patent in suit.¹¹

Paragraphs one and two on page 36 of Appellants' Opening Brief simply restate, with the same factual distortions, some of the matters from pages 13-14 and 24-26, which are disposed of above.¹² We will not rehearse them. We point out, however, that even if there is new coaction between the turntable and the register support because of the latter's stop function, the claims of the George patent are more inclusive and are void for the reasons stated in “F” below.

¹¹Appellants' advertisements do talk of “nest cart space is scientifically provided in this Will L. George engineered *check-out system*.” [R. 281; see also R. 280, 293.] Obviously, this arrangement is not set forth in the patent.

¹²Paragraph two contains the additional inaccurate statement that all prior belt type checkout stands “moved articles longitudinally *past* the side of the checker.” As shown by plaintiffs' own Exhibit 9 [R. 262], the belt can terminate on a line with the register support panel so that items are not carried past the side of the checker.

We submit that a reading of this record cannot support any assertion that there is any new coercion of parts or any new results achieved by the device disclosed by the George claims in issue.

F. Even if There Is New Coaction Between the Turntable and the Register Support, the Claims Are Void for Overclaiming.

Page 36 of Appellants' Opening Brief and Point 5 of Appellants' Conclusion (p. 43) may be read as an attempt to argue that the inventive coaction present is between the turntable and the register support. We do not believe that this can be dignified to the status of invention under "the rigid standards of invention" discussed in "C" above. Be that as it may, such a constriction of appellants' arguments has a two-fold difficulty.

(1) Neither the specifications nor the claims of the George patent are so restricted. The specifications, in fact, emphasize the importance of the *discharge* portion of the stand and state in part:

"The important features of my check stand are the turn-table which brings each item of a purchase into convenient position alongside of the cash register for checking and the *curved shape of the discharge counter which permits the checker to move each item to the rear with a natural swinging motion of her arm and without turning to see where the item is placed.* The two features are mutually cooperative and *I prefer to combine the two*, but either may be used alone with highly desirable results." [George letters patent, col. 4, lines 38-54, R. 253; see also col. 1, lines 29-34, R. 252.]

The claims are just as clear that the discharge counter is an integral element of the device and that its coaction is essential to the protection sought. Thus, for example,

Claim 6 reads as follows [George letters patent, col. 6, lines 33-44, R. 253]:

“6. An apparatus of the class described comprising a rotatable receiving table, a stationary guard rail for a substantial portion of the rim of said receiving table, *a discharge counter disposed in the plane of said receiving table and having a portion thereof conformed to a segment of the table so that articles may be slid from the receiving table to the discharge counter*, means forming a stop for articles on the receiving table and a register support disposed above the plane of said receiving table at the side of said stop, and means for rotating said receiving table.”

(2) If plaintiff is now to be permitted to make his above constricted argument, then the principle of “overclaiming” requires invalidation of the George patent even if we assume that there is a novel coaction between the register support and the turntable (which appellees deny). The *A & P* case again is controlling.

In 340 U. S. 147 at 150, 87 U. S. P. Q. 303, 305, the Court stated:

“In the third place, if the extension itself were conceded to be a patentable improvement of the counter, and the claims were construed to include it, the patent would nevertheless be invalid for overclaiming the invention by including old elements, unless, together with its other old elements, the extension made up a new combination patentable as such. *Bassick Mfg. Co. v. Hollingshead Co.*, 298 U. S. 415, 29 U. S. P. Q. 311, 315-316; *Carbice Corp. v. American Patents Development Corp.*, 283 U. S. 27, 8 U. S. P. Q. 211.”

The principle referred to requires the patentee in his claims to specify and point out “the subject matter which

applicant regards as his invention.” (35 U. S. C. A. 112.) This requirement has been equated with the language in the old 35 U. S. C. A. 33, which provided that the inventor “shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery.” See full discussion in *Winslow Engineering Co. v. Smith*, 223 F. 2d 438, 442-444, 106 U. S. P. Q. 209, 211-212 (9 Cir., 1955) (opinion adhered to on rehearing, 228 F. 2d 332). It is not a compliance with this section to claim the combination where only a particular element or factor is new; rather, if such is the claim the patent is void for overclaiming. See the following Supreme Court cases:

Graver Mfg. Co. v. Linde Co., 336 U. S. 271, 277, 80 U. S. P. Q. 451, 453;

United Carbon Co. v. Binney & Smith Co., 317 U. S. 228, 236, 55 U. S. P. Q. 381;

General Electric Co. v. Wabash Appliance Co., 304 U. S. 364, 368-371, 37 U. S. P. Q. 466, 468-469.

In the case at bar a reading of the claims in issue shows that the various elements are described in aggregation in terms of their previously known functions; no new element or factor is claimed, but merely the combination as a whole. Under the above cases there is clearly overclaiming and the patent must fall.

For recent applications of this principle by this Court, please see the following opinions:

Winslow Engineering Co. v. Smith, 223 F. 2d 438, 106 U. S. P. Q. 209 (9 Cir., 1955);

Jacuzzi v. Berkeley Pump Co., 191 F. 2d 632, 91 U. S. P. Q. 24 (9 Cir., 1951).

Judge Roche's opinion in *Butcher Boy Door Co. v. Phillips Products Co.*, 144 Fed. Supp. 331, 110 U. S. P. Q. 517

(N. D. Cal., 1956), especially at pages 336-337 of 144 Fed. Supp., is especially pertinent to the claims of the George patent.

Applying the above principles of "Overclaiming" to the precise claims of the George patent, we find that *in all the claims in issue* (3, 5, 6 and 7) the discharge counter has been included as an element—in direct contravention of the language above quoted from the *A & P* case, and despite the absence of any new coercion between receiving and discharge counters. Claim 5 is further void for overclaiming because it fails to specify inclusion of a stop portion; the language of this Court in *Winslow Engineering Co. v. Smith*, 223 F. 2d 438, 442, 106 U. S. P. Q. 209, 212 (1955), invalidates this claim even if plaintiff could otherwise show invention. Claim 6 is further void for overclaiming because it is too broad in not locating where the support and stop are—it is merely in terms of "above the plane of said receiving table," and the support and stop could therefore be completely disassociated from the rest of the device. As pointed out in *Graver Mfg. Co. v. Linde Co.*, 336 U. S. 271, 277, 80 U. S. P. Q. 451, 453 (and quoted in the *Winslow* case, *supra*, 223 F. 2d at 443) the specifications cannot be looked to save such a broad claim.

We respectfully conclude that for all the reasons stated in this part I of our brief, the George patent 2,599,909, must be held invalid as to claims 3, 5, 6 and 7 here in issue. We believe invalidity is shown as a matter of law under the cases cited above. Alternatively, we point out that the trial court after a contested trial made detailed findings which support the conclusion of invalidity. [R. 31-35.] Under the above cited cases this Court must affirm those findings and those conclusions.

II.

In Any Event Claims 3, 5, 6 and 7 of the George Patent Are Not Infringed by Defendant Du-More's Check-Out Stand.

A. The Structure and Operation of the Du-More Stand Should Be Accurately Stated.

Pages 31 and 32 of Appellants' Opening Brief distort the true structure and operation of the Du-More stand. The following facts are important to the question of alleged infringement if that question is reached:

(1) The register support panel in the Du-More device does not have "a stop portion along one edge thereof." Rather, the panel is so designed that registers placed thereon will overhang the edge of the support panel. [R. 132: "It is true that there is a support panel, which has an edge, over which, however, the cash register actually extends in use, and that edge need have no function." R. 230: "Because of the guide we put on the side, facing the register would be the right side, it forces the register over the panel just slightly." See also R. 143-144.] If any articles are stopped by striking an object in the Du-More stand, they strike, with minimal exceptions, the register and not the register support panel. George expressly disclaimed the register as part of his combination. [See renumbered p. 44 of the patent file, Deft. Ex. B.]

(2) In the Du-More device the turntable is normally rotating and is not started or stopped by the checker operating a switch or any other member. A halting of the turntable itself is caused by the breaking of the electric circuit by objects intercepting the light beam of the electric eye. The cessation of motion of the turntable of course brings the objects thereon to a halt—regardless of any stop portion or bar which might intercept the items (but

not the turntable). Thus, in George the items are intercepted on a moving turntable; in Du-More the turntable itself is halted by the electric eye device. Appellants state that this is so "in theory" but not in fact because of an overrun or inertia which caused the turntable "to carry any article against the side of the register support panel after the power was turned off." (App. Op. Br. p. 32.) The extent of this overrun was two or three inches at the perimeter of the turntable and less than that towards the center of the turntable. [R. 128.] And if any contact is made, it is with the register and not the register support panel. [R. 143-144.]

In this connection, too, we must point out that at page 41 of Appellants' Opening Brief, appellants quote only part of the answer of appellees' expert, so that his testimony is distorted by truncation.

"Would you identify that means which forms both a stop and register support in the George patent? A. Yes. In the George patent construction, that is the register supporting panel 28, which performs the double function of supporting the register and providing the stop.

Q. Would you identify the stop by a reference numeral? A. Yes. That bears the reference character 29 in figure 1.

Q. Do you find a similar or corresponding structure in the defendant Du-More's check stand? A. In the Du-More check stand, there is a register supporting panel, so indicated in figures 1 and 2 of Exhibit D-1. There is an edge of the panel which, if needed, could perform the function of a stop. *It is not functionally required, because the rotation of the turntable is stopped by the electric eye switch.*"

(3) Only if the George patent can be said to encompass merely a turntable in a check-out stand, and no other elements, are the statements in the full paragraph on page 32 of Appellants' Opening Brief true. In fact, however, the claims in suit include many more elements, as will be shown *infra*, and there is no infringement of any of them by the Du-More device.

B. The First Inquiry on the Question of Infringement Is to Construe the Claims of the George Patent in the Light of File Wrapper Estoppel.

Defendants-appellees emphasized the doctrine of file wrapper estoppel and it was a frequent subject of testimony and colloquy during the trial. [*E. g.*, R. 45, 178-180.] Appellants' Opening Brief is conspicuously silent on the doctrine of file wrapper estoppel but emphasizes the doctrine of equivalents.

The opinion in *Lewis v. Avco Mfg. Corp.*, 228 F. 2d 919, 923, 108 U. S. P. Q. 147, 150 (7 Cir., 1956), is directly in point on appellants' approach:

"As previously noted, we get from defendants' brief the definite idea that they do not dispute infringement under the doctrine of equivalents in the absence of file wrapper estoppel. At the same time, we note that plaintiff makes little effort to answer defendants' argument on the defense of file wrapper estoppel but hammers away on the theory that there is infringement under the doctrine of equivalents. In our view, this is a fallacious approach to the problem. It is akin to placing the cart before the horse.

"The doctrine of file wrapper estoppel, when applicable, supersedes that of equivalents. Its existence,

rightly or wrongly, protects an accused who otherwise might be guilty of infringement.”¹³

The principle of file wrapper estoppel, of course, is well known. It has been succinctly stated as follows:

“It is a rule of patent construction consistently observed that a claim in a patent as allowed must be read and interpreted with reference to claims that have been cancelled or rejected, and the claims allowed cannot by construction be read to cover what was thus eliminated from the patent.”

Schriber-Schroth Co. v. Cleveland Trust Co., 311 U. S. 211, 220, 47 U. S. P. Q. 345, 349.

And in *Smith v. Magic City Kennel Club, Inc.*, 282 U. S. 784, 790, 8 U. S. P. Q. 123, 125-126, the Court stated:

“The applicant having limited his claim by amendment and accepted a patent, brings himself within the rules that if the claim to a combination be restricted to specified elements, all must be regarded as material, and that limitations imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and looked upon as disclaimers. *Sargent v. Hall Safe & Lock Co.*, 114 U. S. 63, 86; *Shepard v. Carrigan*, supra, 598; *Hubbell v. United States*, supra, 85. The patentee is thereafter estopped to claim the benefit of his rejected claim or such a construction of his amended claim as would be equivalent thereto. *Morgan Envelope Co. v. Albany Paper Co.*, 152 U. S. 425, 429.”

¹³Defendants here, of course, dispute infringement even in the absence of file wrapper estoppel. The doctrine, however, makes lack of infringement absolutely certain.

The doctrine of file wrapper estoppel applies not only to acquiescence in rejection of claims and substitution therefor, but also to arguments made by the patentee in the Patent Office in the process of obtaining a grant of letters patent.

D & H Electric Co. v. M. Stephens Mfg., Inc.,
233 F. 2d 879, 883, 110 U. S. P. Q. 469, 472
(9 Cir., 1956);

Jeoffrey Mfg., Inc. v. Graham, 219 F. 2d 511, 515-
516, 104 U. S. P. Q. 261, 265 (5 Cir., 1955);

Steffan v. Len A. Maune Co., 234 F. 2d 750, 752,
110 U. S. P. Q. 7, 8-9 (8 Cir., 1956);

Lewis v. Avco Mfg. Corp., 228 F. 2d 919, 923-928,
108 U. S. P. Q. 147, 152-154 (7 Cir., 1956);

Thabet Mfg. Co. v. Koolvent Metal Awning Corp.,
225 F. 2d 207, 210, 107 U. S. P. Q. 61, 64
(6 Cir., 1955).

C. When so Construed, Claims 3, 5, 6 and 7 of the George Patent Must Be Severely Limited.

1. AS TO CLAIM 3:

By amendment [patented file, renumbered page 65, Deft. Ex. B] the following language was added to application claim 9, now patent claim 3: "said discharge counter extending longitudinally from said end *with its inner edge concavely arcuate* with respect to said support panel." The importance to applicant of the italicized phrase in said new language is seen from the argument he made on renumbered page 67 of the patented file. The patentee cannot now claim that the George patent covers a combination which includes a counter extending longitudinally from said end with its inner edge *straight* with respect to said support panel. The file wrapper thus emphasizes that

the means and manner of operation of the Du-More stand with a straight arm motion by the checker are different from the means and manner of operation of the George stand where there is a curved and allegedly "natural" arm swinging motion by the checker.

2. AS TO CLAIM 5:

Renumbered page 34 of the patented file shows that the following italicized phrase was added to claim 5 by amendment: "A register support panel supported above a quadrant of said turntable *adjacent to said counter* whereby said turntable will rotate freely in closely spaced relation and underneath said support panel." The argument of the applicant on renumbered page 51 of the patented file was that application claims 11 and 13 (now patent claim 5) include the base portion of the stand *and* the manner of supporting the register supporting panel *from the* turntable post and *discharge counter*. The patentee will not now be allowed to claim that register support panels not supported from the discharge counter are nevertheless covered by his claims. See full discussion in *D & H Electric Co. v. M. Stephens Mfg., Inc.*, 233 F. 2d 879, 883, 110 U. S. P. Q. 469, 472 (9 Cir., 1956).

3. AS TO CLAIM 6:

Application claim 20 (now patent claim 6) was amended, at patented file renumbered page 34, to call for the same single "means" to form a stop and a register support. Such amendment was made in compliance with rejection of such claim at renumbered page 31 that "Claim 20 is rejected as being deficient in twice claiming the same member, the article stop and the register support being one and the same element." It follows that in the following language of patent claim 6 plaintiff must be restricted to

a *single* means: "Means forming a stop for articles on the receiving table and a register support disposed above the plane of said receiving table at the side of said stop."

4. AS TO CLAIM 7:

The application claim 21, now claim 7, was added by amendment at patented file renumbered page 66 to include the same features as application claim 20 (now claim 6) with the "means for rotating said receiving table" omitted. Actually claim 7 expressly calls for the register support "having a side edge extending generally radially of said receiving counter to the periphery thereof to form an article stop." In connection with the doctrine of file wrapper estoppel, a claim added by amendment is in no different category than a claim which has been amended.

D. The Record Shows That There Is No Infringement of Any Claim.

(Ref. pp. 31-32, 40-41, and X-XIII of App. Op. Br.)

In determining infringement, it must be remembered that the burden is on the patentee-appellant and that *every* element of the combination must be embodied in the alleged infringing device.

I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429, 444 (1926);

Lektophone Corporation v. Rola Co., 282 U. S. 168, 171, 7 U. S. P. Q. 107, 108 (1930);

Kwikset Locks, Inc. v. Hillgren, 210 F. 2d 483, 490, 100 U. S. P. Q. 289, 294 (9 Cir., 1954);

Simons v. Davidson Brick Co., 106 F. 2d 518, 523, 43 U. S. P. Q. 297 (9 Cir., 1939);

Montgomery Ward & Co., Inc. v. Rogers, 100 F. 2d 721, 722, 40 U. S. P. Q. 138, 139 (4 Cir., 1939).

It must be shown that there is substantial identity of means, mode of operation, and result; a difference in any one of these elements prohibits a finding of infringement.

Air Devices, Inc. v. Air Factors, 210 F. 2d 481, 483, 100 U. S. P. Q. 296, 297 (9 Cir., 1954).

1. AS TO CLAIM 3:

The Du-More device does not contain the following elements which are essential to Claim 3 of the George patent:

(a) “. . . a register support panel *having a stop portion along one edge thereof.*” As stated above, in George the turntable continues to rotate and articles are brought to a stop by impact against “a stop portion” of the register support; in Du-More, the turntable itself is brought to a stop and the impact of articles if any (because of the incidental overrun) is against the register and only rarely, if at all, against the register support. In short, there is no “stop portion” of the register support in Du-More. [See R. 131-132.] The register, having been expressly disclaimed as part of the George combination (see renumbered page 44 of the patented file), of course cannot be equated with a stop portion of the register support panel.

(b) “said discharge counter extending longitudinally from said end with *its inner edge concavely arcuate* with respect to said support panel.” Because of the amendment of his claims in the patent office, it will not lie with appellant now to argue that Du-More’s straight inner edge is the equivalent of George’s *concavely arcuate* edge. [See R. 133-135.] As shown on the cited pages of the Reporter’s Transcript, a checker using the George device swings her arm back in an arcuate manner and the items

come to rest behind her rather than rearwardly to her left. (This is also emphasized in the George letters patent, p. 1, col. 2, lines 36-47, and p. 2, col. 4, lines 43-51: “. . . the curved shape of the discharge counter which permits the checker to move each item to the rear with a natural swinging motion of her arm and without turning to see where the item is placed.”) A checker on the Du-More device, however, moves her arm backwardly in a straight line and the items come to rest rearwardly but to her left. Thus, the devices are operated in a different manner and accomplish a different placing of the items of purchase. This precludes a finding of infringement. *Air Devices, Inc. v. Air Factors*, 210 F. 2d 481, 483, 100 U. S. P. Q. 296, 297 (9 Cir., 1954), and cases there cited.

(c) “means for controlling said motor located behind said discharge counter for operation by the operator of said stand.” As explained above and by the witness Sellers [R. 136-137], the means for controlling the motor in Du-More in normal operation is the electric eye located above the turntable and not behind the discharge counter for use by the checker.

2. AS TO CLAIM 5:

The Du-More device does not contain the following element which is essential to Claim 5 of the George patent:

(a) “a register support panel *supported* above a quadrant of said turntable *adjacent to said counter* whereby said turntable will rotate freely in closely spaced relation and underneath said panel.” As shown in C-2 above, plaintiff is estopped by the patented file from arguing that Claim 5 covers a register support panel with a cantilever mounting, as Du-More has. [See R. 138-139.] Similarly,

the argument advanced at trial by appellants that the word "located" is meant by the claim rather than "supported" cannot be made. Indeed, this is the first time such meaning has been urged by the patentee, the file showing conclusively that the place of support was intended. At best this after-thought argument merely points up the fact that if such were the intended meaning of the claim, the claim must be held void for indefiniteness. A claim which requires such interpolation does not comply with Section 112 of the Patent Act of 1952, which requires the applicant to particularly point out and distinctly claim the subject matter which he regards as his invention.

Winslow Engineering Co. v. Smith, 223 F. 2d 438, 444, 106 U. S. P. Q. 209, 213 (9 Cir., 1955).

3. AS TO CLAIM 6:

The Du-More device does not contain the following element which is essential to Claim 6 of the George patent:

(a) "means forming a stop for articles on the receiving table and a register support disposed about the plane of said receiving table at the side of said stop." As shown in C-3 above, a single means is here required. But in the Du-More device the register support is not the means forming a stop for articles on the receiving table; rather, the electric eye stops the turntable itself, and any items at its periphery which may be incidentally stopped by impact strike against the register and only rarely, if at all, against the support. See R. 141 and the testimony of defendant's witness Garth: "Because of the guide we put on the side, facing the register would be the right side, it forces the register over the panel just slightly." [R. 230.]

4. AS TO CLAIM 7:

The Du-More device does not contain the following element which is essential to Claim 7 of the George patent:

(a) "A register support . . . having a side edge extending generally radially of said receiving counter to the periphery thereof *to form an article stop* for articles rotated there against by said receiving counter." Please see discussions above under Claims 3 and 6.

E. Summary on Infringement.

Especially in the light of the doctrine of file wrapper estoppel, it is obvious that defendant Du-More's device is not the equivalent of plaintiffs' claimed devices within the meaning of patent law. The means of stopping items in defendant's device is an electric eye which halts movement of the turntable itself and, as a consequence, stops the items on the turntable. There is no "stop portion" of a register support in defendant's device against which the items will bump and come to rest: In defendant's device the turntable is stopped. In plaintiff's claims the items are halted but the turntable continues to rotate. In short, there is no substantial equivalency of means, mode of operation, or result. In addition, defendant's discharge counter has a straight edge, not one concavely arcuate with respect to the support panel (Claim 3); and defendant's register support panel is not supported adjacent to the discharge counter. (Claim 5.)

What this Court stated in *Air Devices, Inc. v. Air Factors*, 210 F. 2d 481, 483, 100 U. S. P. Q. 296, 297 (9 Cir., 1954), applies here:

"The fact that the two devices accomplish the same result, or perform the same function, settles nothing about infringement. *Westinghouse v. Boyden Power*

Brake Co., 170 U. S. 537, 554; Cimiotti Unhairing Co. v. Am. Fur. Ref. Co., 198 U. S. 399, 414. Identity of result is no test. Stebler v. Porterville Citrus Assn. (9 Cir.), 248 Fed. 927. As the results obtained are not secured by the same means, or by a device operated in the same manner, or in substantially the same manner, the several devices are not equivalents. Leishman v. Associated Wholesale Electric Co. (9 Cir.), 137 Fed. 2d 722, 727 (59 U. S. P. Q. 1, 7).

“The judgment is affirmed.”

Conclusion.

Defendant Du-More submits that the George patent is clearly invalid because it is a mere aggregation, because of the doctrine of overclaiming, and because of the prior art. Even if the George patent is valid, defendant's device does not infringe the language and substance of the claims. Because of the proceedings before the United States Patent Office as set forth in the patented file, plaintiff is estopped to argue that the claims should be more broadly construed to cover the Du-More device.

Findings in accord with these conclusions were clearly required by the voluminous record; findings contrary to them would not be supported by the evidence. This Court should therefore affirm.

Respectfully submitted,

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**United States
Court of Appeals
For the Ninth Circuit**

KENNETH J. PHIPPS,

Appellant,

vs.

N. V. NEDERLANDSCHE AMERIKA-
ANSCHÉ STOOMVART, MAATS,

a Corporation, also known as

HOLLAND-AMERICA LINE,

Appellee.

Brief of Appellant

**Appeal from the United States District Court
for the District of Oregon.**

WILLIAM G. EAST, Judge

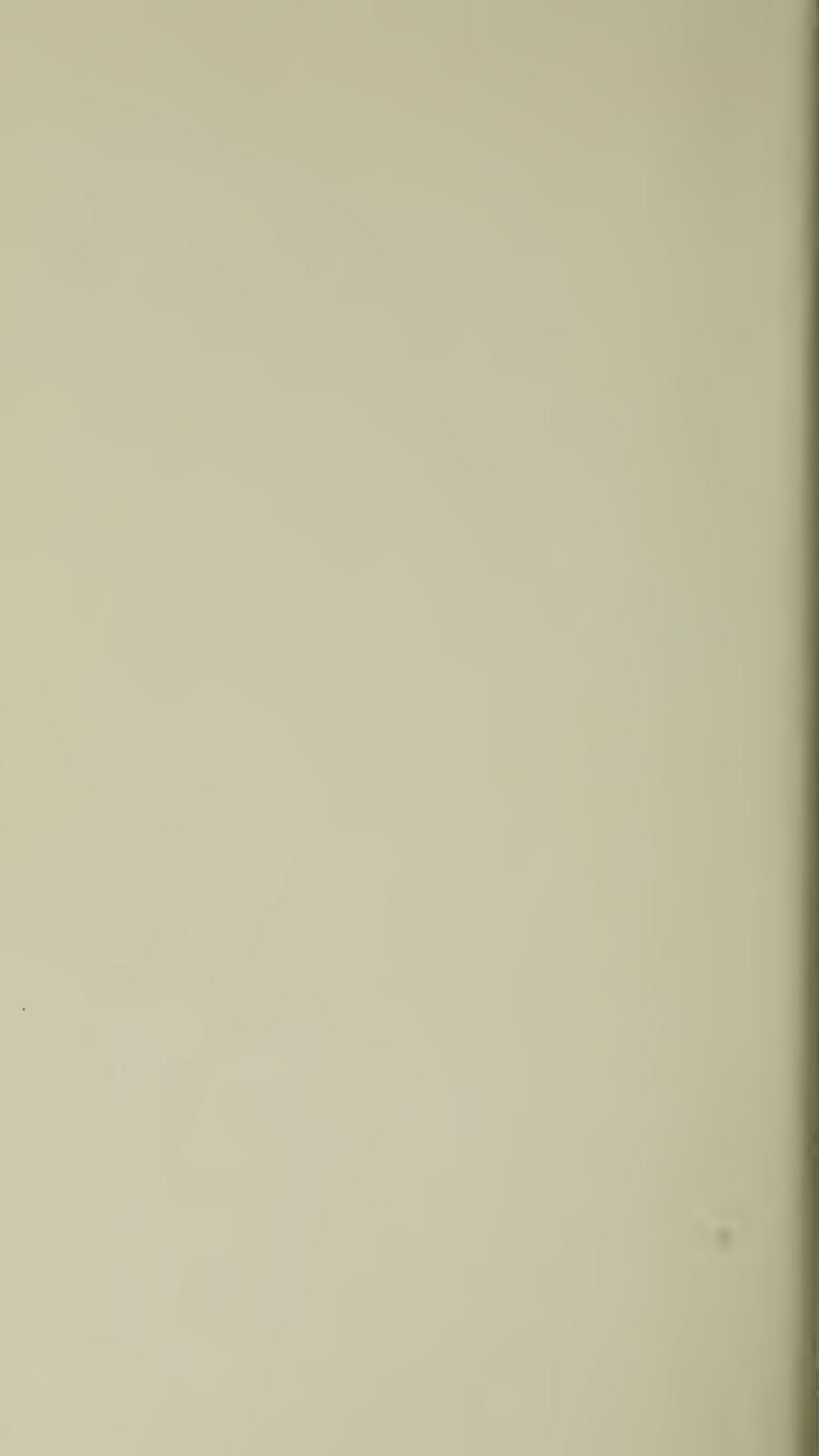
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FILED

MAY 5 1958

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SUBJECT INDEX

	<i>Page</i>
Statement Showing Jurisdiction	1
Statement of the Case	2
Specification of Error Number One	11
Argument	11
Specification of Error Number Two	27
Argument	27
Specification of Error Number Three	32
Argument	32
Specification of Error Number Four	32
Argument	33
Specification of Error Number Five	33
Argument	34
Specification of Error Number Six	34
Argument	35
Specification of Error Number Seven	37
Argument	38
Specification of Error Number Eight	39
Argument	40
Specification of Error Number Nine	40
Argument	41
Conclusion	42
Appendix	43

INDEX TO AUTHORITIES

	<i>Page</i>
Arthur v. Parish, 150 Or. 582, 47 P. 2d 682	35, 39
Biddle v. Mazzocco, 204 Or. 547, at 554, 284 P. 2d 364 (June 2, 1955)	26
Boord v. Kaylor, 114 Or. 62, 234 Pac. 263	37
Burgess v. Charles A. Wing Agency, 139 Or. 614, 11 P. 2d 811	37
Elkton Auto Sales Corp. v. State of Maryland, 53 F. 2d 8, 10 (5th Circuit)	19
Ferguson v. Moore-McCormick Lines, Inc. (1957) 352 U.S. 521, 1 L. Ed. 2d 511, 515, 77 S. Ct. 457, 459	16
Finn v. Spokane, Portland & Seattle Ry. Co., 241 P. 2d 876, 194 Or. 288 (1952)	23
Feinman v. A. H. Bull S. S. Co., 216 F. 2d 393	30
Jensen v. Salem Sand & Gravel Co., 192 Or. 51, 233 P. 2d 237 (1951)	25
Meyers v. Pittsburgh Steamship Co., (6 Cir. 1948) 165 F. 2d 642	24
O'Leary v. United States Line Co., 215 F. 2d 708 at 715 (1 Cir. 1954)	24
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143, 198 F. 2d 800	31
Rogers v. Missouri P. R. Co. (1957) 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493	15
Sadler v. Pennsylvania R. Co., 159 F. 2d 784	17
Smith v. Shevlin-Hixon Co., 157 F. 2d 51 (CA 9th 1946)	20, 27
Sullivan v. Shell Oil Co. (9th Cir. 1956) 234 F. 2d 733	26
The Indien, 71 F. 2d 752, at page 759 (9th Cir.)	20
Texas & Pac. R. R. v. Behymer, 189 U.S. 468; 23 S. Ct. 622, 47 L. Ed. 905	19, 20
U. S. v. Arrow Stevedoring Co., 175 F. 2d 329 (C.A. 9th 1949)	30
United States v. Luehr and Jones Stevedoring Company, 208 F. 2d 138 (9th C. A. 1953)	29
Urie v. Thompson, 337 U.S. 163; 69 S. Ct. 1018, 93 L. Ed. 1282	19
Webb v. Illinois C. R. Co., 352 U.S. 512, 1 L. Ed. 2d 503, 77 S. Ct. 451, reh den 353 U.S. 943, 1 L. Ed. 2d 764, 77 S.C. 809 (1957)	16

INDEX TO STATUTES CITED

	<i>Page</i>
28 U.S.C.A., Sections 1291 and 1294	2
28 U.S.C.A., Sections 1331, 1332, sub. 2, and 1333, sub 1	2
45 U.S.C.A., Section 53	15

**United States
Court of Appeals
For the Ninth Circuit**

KENNETH J. PHIPPS,

Appellant,

vs.

N. V. NEDERLANDSCHE AMERIKA-
ANSCHÉ STOOMVART, MAATS,

a Corporation, also known as
HOLLAND-AMERICA LINE,

Appellee.

Brief of Appellant

**Appeal from the United States District Court
for the District of Oregon.**

STATEMENT OF JURISDICTION

This is an action at law based upon a complaint for personal injuries between a longshoreman and citizen of the State of Oregon and a foreign corporation existing under the laws of Holland (T. 1, 2, 15, 17 and R.T. 273) in which the appellant claims damages of more than \$3,000.00 for a maritime tort against appellee corporation (T. 2, 17 and R.T. 273-4). The answer admits such diversity of citizenship and the jurisdictional

amount is involved in this case. (T. 12). A final judgment in favor of appellee and against appellant based upon the directed verdict of the jury was filed on September 27, 1957, and this appeal was thereafter seasonably perfected (T. 32-3) and bond for costs on appeal filed. (T. 35). It is contended that the United States District Court for the District of Oregon had jurisdiction of this action on the basis of the above facts under 28 U.S.C.A., Sections 1331, 1332, sub. 2, and 1333, sub. 1; and that the United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under 28 U.S.C.A., Sections 1291 and 1294.

(T. refers to Transcript of Record). (R.T. refers to Reporter's Transcript). (Blackface type where used are supplied by appellant.)

STATEMENT OF CASE

The admitted facts in this case as stipulated in the Pretrial Order (T. 15, 16, 17 and R.T. 273-4) show:

1. N. V. Nederlandsche Amerikaansche Stoomvaart, Maats, a steamship operator, was and now is a corporation, organized and existing under and by virtue of the laws of Netherlands.

2. W. J. Jones & Sons, Inc., a stevedore company, was and now is a corporation, organized and existing under and by virtue of the laws of the State of Oregon.

3. The stevedore contract dated April 19, 1954, and

duly executed by W. J. Jones & Son, Inc., and Royal Mail Lines Limited and Holland-America Line, which is listed as a pretrial exhibit, was a stevedore contract agreed upon and existing between defendant and W. J. Jones & Son, Inc., and pursuant to said contract, W. J. Jones & Son, Inc., was engaged in loading the Motor Vessel Dalerdyk at the time and place of plaintiff's alleged accident.

4. On or about June 11, 1954, the plaintiff was working as a hold man in a longshore gang, all of whom are employed by the master stevedore, W. J. Jones & Son, Inc., who was loading the Motor Vessel Dalerdyk, said vessel being owned and operated by defendant; that at the time of said alleged accident, the vessel was lying at a dock known as Albina Dock, in the Port of Portland, Oregon.

5. On or about June 11, 1954, defendant was the employer of the master, officers and crew of said vessel and the master stevedore, W. J. Jones & Son, Inc., was the employer of all the longshoremen who were performing the work of loading and discharging said vessel.

6. Plaintiff elected to pursue a remedy against the defendant pursuant to the provisions of the Longshoremen's and Harbor Workers' Act of the United States, and has filed with the United States Department of

Labor, Bureau of Employees Compensation, a formal notice of election to sue.

7. Plaintiff was, and is, a resident and citizen of the State of Oregon, and the amount in controversy is in excess of \$3,000.00, exclusive of interest and costs.

8. At all material times there was a Pacific Coast Marine Safety Code, which was agreed to and adopted under the provisions of the Pacific Coast Longshore Agreement, 1951-1953.

The evidence shows that appellant was a longshoreman working as a hold man in a longshore gang assisting in loading and stowing certain heavy dimensioned timber cargo, each piece of such timber being approximately 3" x 6" in size and random lengths up to approximately 35' long, with 18 or 20 pieces to one sling load, and appellant was working at and near the bottom of No. 3 hatch of such vessel and about six feet away from and underneath the hatch coaming. Such hatch was approximately 35 to 40 feet in depth and 20 feet square and lined with a steel lining from top to bottom and did not have any guard rail or railing around the top of such hatch on the deck. (R.T. 25, 26, 159-172 inclusive, 191-198 inclusive).

The evidence further shows that in connection with such cargo loading operation, such timber cargo was lowered into and down such hatch by sling loads se-

cured by a single cable sling and lowered by electric power-driven winches, and because of the small construction of such hatch and hold area, such sling loads of heavy timbers had to be lowered down such hatch nearly end first. (R.T. 37, 38, 88-98 inclusive, 104, 173-180 inclusive, 194).

The evidence further shows that when appellant was so working in the bottom of such hatch and while a large sling load of approximately 20 pieces of such random length timbers were being lowered over and down said hatch near the top thereof, suddenly and without warning one large heavy 3"x 6" timber approximately 35' long slipped out of such sling load and fell end first down into said hatch and down and upon the left leg and foot of appellant and appellant then and there received the grave and serious injuries hereinafter mentioned. (R.T. 26, 27, 31, 32, 37, 38, 80, 81-99 inclusive, 104, 105, 167, 168, 193-205 inclusive).

The witness, Charles Edward Hodges, who was the superintendent in charge and agent of appellee in Portland, Oregon, and who testified as one of its witnesses, testified on cross examination that he was present on board such vessel several times on the day of the accident involved in this case (R.T. 248), and that he was in charge of all business for this ship for appellee, and that he or his supercargo gave instructions to the stevedore company where to place the various kinds of cargo

being loaded upon such vessel, including these large timbers. (R.T. 228, 250). Mr. Hodges further testified on cross examination that there were two large hatches on this ship, number 2 and number 5, each of them being approximately 36 feet long and 20 feet wide, in which such sling loads of heavy dimensioned timbers could have been loaded flat or cross ways, with two slings attached to each sling load, so that it would be impossible to have a slider fall out of any such sling load while such cargo was being loaded into the large hatch. (R.T. 239, 240). The evidence, through appellee's vessel loading record, also shows that some of this large dimensioned decking timber was so loaded into both of these larger hatches. (Exhibit 6).

Dr. Howard L. Cherry testified about the serious and permanent injuries appellant received as a result of this heavy stick of timber smashing and crushing his left foot, which included amputation of the great toe and the toe next to it. (R.T. 126-153 inclusive). Dr. Cherry also explained the color slide pictures taken by Dr. Rowland, appellant's exhibits 4-D through 4-J. (R.T. 136-144 inclusive). Appellant's hospital records (Exhibit 5) are very extensive and show his long period of hospitalization.

Dr. Willard D. Rowland, a surgeon who specializes in plastic and reconstructive surgery, also testified as to the serious and permanent injuries appellant re-

ceived as a result of this accident. (R.T. 45-71 inclusive). Dr. Rowland also testified about the nature of the several operations that he performed upon appellant, and that he took seven color slide pictures to show the progress of the injury and the operative procedure. These slides were received in evidence as appellant's exhibits 4-D through 4-J. (R.T. 136-144 inclusive, and 152).

It was stipulated and agreed between the attorneys for appellant and appellee at the trial of this case that the total amount of hospital and medical expenses incurred by the appellant in connection with his injuries received in such accident amounted to the sum of \$7,120.00. (R.T. 155, 156).

The evidence also showed that the appellant was earning the sum of \$22.05 per day as a longshoreman at the time of his accident on June 11, 1954, and that he had not been able to work in his employment as a longshoreman at any time since said date as a result of the injuries received in the accident. (R.T. 187-191 inclusive). This would make a total of approximately \$15,000.00 that appellant has lost in wages up to the time of the trial of this case in September, 1957.

The evidence also showed that at the time of the accident appellant was a strong able-bodied man, 40 years of age, with a life expectancy of 28 years. Mr. Phipps also testified that he was a member of the

United States Marines in World War II (R.T. 183, 186, 187, 276).

The specifications of negligence and unseaworthiness charged against appellee by appellant are as follows:

(a) Defendant-appellee failed to provide sufficient, adequate and safe ship's gear and equipment and a safe working place for all stevedoring operations on board said ship, including more particularly, the operation whereby appellant was injured; ;

(b) Defendant-appellee failed to see that all working conditions were safe;

(c) Defendant-appellee failed to see that said operation was carried on in a safe manner;

(d) Defendant-appellee failed to stop said work and operation in order to avoid an accident and injury to appellant;

(e) In that the master, owners or agents of the said steamship and defendant-appellee improperly directed this appellant to work in an unreasonable, defective and dangerous place in that he was working in a small cramped area, where he was exposed to extreme danger of being struck by the fall of such large heavy timber, which did fall as herein described;

(f) That said vessel was unseaworthy by reason of the

way said hatch and surrounding hold area were constructed and used for such lumber loading operation in that such hatch and hold area were too small and too dangerous and unsafe for loading and stowing such large sling loads of long heavy pieces of timber by the aforesaid method;

(g) Defendant-appellee improperly used said Number three hatch by causing and directing said large loads of long pieces of heavy lumber cargo to be loaded into and stowed in said hatch by the aforesaid method, when defendant-appellee knew or should have known by the exercise of reasonable care that such operation was extremely dangerous and liable to result in injuries to longshoremen, including appellant, working said hatch, and when said vessel then had one or two other larger hatches which were available, and which could have been used to load and stow such large loads of said lumber and could have been lowered and loaded crossways, and thereby make it a reasonably safe operation and avoid injuring appellant. (T. 3, 4, 5, 6, 7, 8, 19, 20, 21).

After both sides had produced all their witnesses and the testimony was all in, both sides then rested. The appellee then moved the court for a directed verdict in its favor for the reason that appellant had failed to present evidence sufficient to go to the jury that there

was negligence or unseaworthiness of the vessel that proximately caused appellant's injuries. (R.T. 283).

The court thereupon allowed such motion for a directed verdict and ordered the jury to return a verdict in favor of the appellee, which was then done, and a judgment thereon was filed on September 7, 1957. (R.T. 304-312 inclusive). Thereupon this appeal was perfected from said judgment.

The appellant contends that the trial court erred in directing such verdict; and further, that the evidence affirmatively shows that it is a jury question that said accident was caused without any contributory fault or negligence on the part of the appellant and solely and proximately by the defective, unsafe and unseaworthy condition of said vessel by the failure of appellee to provide proper and sufficient ways, works, means and appliances on said vessel, and by the fault and negligence of the appellee acting by and through its agents and the master and crew of said steamship in certain particulars, which are set out in detail in this statement and in Specifications of Error Numbers 1 through 5 in this brief.

Appellant further contends that the trial court erred in rejecting or refusing to admit certain evidence, as set out in Specifications of Error Numbers 6, 7 and 8 herein.

SPECIFICATION OF ERROR NUMBER ONE

The trial court erred as a matter of law in allowing and directing a verdict for said appellee, which was objected to by appellant, and having judgment entered thereon and against appellant, for the reason that such verdict and judgment is against and contrary to the evidence and the law involved in this case.

ARGUMENT

As outlined in the statement of this case in this brief, the evidence shows that the appellant longshoreman was engaged in his work assisting other longshoremen in stowing 3 x 6 heavy rough timbers of random lengths up to 35 or 40 feet long at the bottom of No. 3 hatch when he was hit on his left foot by a slider that fell to the bottom of the hatch out of a sling load that was just starting down such small hatch nearly straight up and down, and secured by only a single cable sling. (R.T. 25, 26, 159-172 inclusive, 191-198 inclusive).

The evidence shows that such small hatch approximately 20 feet square, was not designed, intended or suitable for the safe loading and stowage of sling loads of 35 or 40 foot long pieces of 3 x 6 timbers because such long loads had to go down nearly end first, and a slider would be apt to fall out during such an operation and injure a longshoreman, as in the case at bar.

(R.T. 37, 38, 88-98 inclusive, 104, 173-180 inclusive, 194).

The evidence also shows that appellee knew or in the exercise of reasonable care should have known that such sling loads of lumber could have been safely loaded in two other larger hatches of such vessel where they could have been loaded flat or crossways, using two cable slings to one load, and a slider could not come out of such sling loads loaded in such a manner. (See the two following paragraphs).

Charles Edward Hodges, Superintendent of the Norpac Shipping Co., and agents for appellee, testified that he had charge of all the business of the ship involved in this case while the Dalerdyk was at Portland, Oregon, and during the time when appellant was injured. (R.T. 227, 228). Also that he was on board the Dalerdyk several times the day appellant was injured. (R.T. 248), **and that he or his supercargo (representing appellee) told the stevedoring company in what hatches to load certain cargo.** (R.T. 250.)

Mr. Hodges also testified on cross examination that if these sling loads of $3\frac{1}{2}$ or 3 by 6 timbers of random lengths of up to 30 or 40 feet long to a sling load with about 18 pieces to a sling load had been loaded crossways or flat with two slings on a load down one of the larger hatches on the Dalerdyk, that you could not have a slider come out of such a sling load while load-

ing such cargo. (R.T. 240). This would certainly make it a much safer operation, and then appellant would not have been injured. Appellee failed to do this, and appellant was injured.

The evidence from the ship's loading record also shows that the same type of heavy rough decking that injured appellant was loaded into hatches 2 and 5, the two larger hatches of the Dalerdyk, (R.T. 239) where the slingloads did go down flat or crossways, on this same trip and loading operation. (Exhibit 6).

One witness, William H. Pitzer, testified as a witness for appellee that he was the operating manager of the States Steamship Company and had years of experience as a supercargo. Upon cross examination Mr. Pitzer testified that Rule 201 of the Pacific Coast Marine Safety Code (Exhibit 2) specifies that the owner and operator of all steamships shall provide a safe working place for all longshoremen engaged in loading or unloading cargo on such vessel. (R.T. 266, 267, 271). Opposing counsel agreed such safety code and rule applies to this case. (R.T. 210, 211).

The record further shows that appellant attempted through offers of proof by several of his witnesses to elicit additional evidence to the effect that if such heavy timbers or lumber cargo was loaded and stowed into either of these larger hatches on such vessel, that a slider could not fall out of such sling loads being so

loaded, and therefore the injuries to appellant would and could have been avoided. (R.T. 214, 215, 216).

Considering the cases cited in this argument, appellant also contends that the trial judge was in error in his interpretation of the law applicable to this case when in allowing a directed verdict, he said:

"Now, throughout the trial the plaintiff's theory has been, particularly under its Specification G, that the defendant improperly used No. 3 hatch by causing and directing said large loads of long pieces to be loaded into and stowed in the hatch when it should have known by the exercise of reasonable care that the operation was extremely dangerous and liable to result in injury to long-shoremen, including plaintiff, working in the hatch and when said vessel then had one or two other larger hatches which were available.

"Well, the Court has tried to be consistent since the initial ruling in that I am still of the opinion that a person cannot be negligent for not doing something. They are negligent for doing something. So, if the steamship company is to be held liable to the plaintiff in this case for negligence, it must be for something that they did."

(R.T. 304, 305).

Moreover, after the two-hour long noon recess, appellant suggested to the trial judge that because of the unusual hardship and serious injuries and substantial loss of wages to appellant, that the Court reconsider his ruling in allowing a directed verdict in favor of the

defendant, and let the case go to the jury. The trial judge said he thought that would just aggravate the matter, and then directed a verdict in favor of the defendant. (R.T. 309, 310, 311, 312).

Appellant contends that the same rule followed by the United States Supreme Court in Jones Act and Federal Employers' Liability Act cases, under its broad interpretation of common law standards as to negligence, also applies in the case at bar.

The relevant part of the FELA Statute, 45 U.S.C.A. section 53, provides that in personal injury cases:

"... the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Rogers v. Missouri P. R. Co., 352 U.S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443 (1957) holds that the test of a jury case under FELA is whether the **proofs justify with reason the conclusion that the employer's negligence played even the slightest part in producing the injury or death for which damages are sought; when this test is met the judge must find that a jury case exists notwithstanding that, from the evidence, the jury may also, on grounds of probability, reasonably attribute the result to other causes, including the employees contributory negligence.**

In **Webb v. Illinois C. R. Co.**, 352 U.S. 512, 1 L. Ed. 2d 503, 77 S. Ct. 451 (1957) which was another case by a railroad brakeman under FELA, the court, at page 507, said:

"Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence."

"Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities."

The court then reversed the judgment of the court of appeals, which had reversed the trial court on the ground of the insufficiency of the evidence to support a jury finding of the employer's negligence.

In **Ferguson v. Moore-McCormick Lines, Inc.**, (1957), 352 U.S. 521, 1 L. Ed. 2d 511, 515, 77 S. Ct. 457, 459,

the court holds that **whether the act or failure** did in fact produce in part the injury to plaintiff, **the court must not** substitute its judgment as to foreseeability and causation for that of the jury. The court said, at page 514:

"Since the standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act, what we said in *Rogers v. Missouri Pacific R. Co.*, 1 L. Ed. 2d 493, 515, decided this day, is relevant here.

"Under this statute the test of a jury case is simply whether the proofs, justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

In a Jones Act case, **Sadler v. Pennsylvania R. Co.**, 159 F. 2d 784, at 786, there was evidence that the ship-owner or the vessel had failed to provide a safe place to work, and there was proof of circumstances on which it could be reasonably inferred that the injury resulted from that failure.

From the opinion, at page 786, the court said:

"Under the evidence here, it was for the jury to say **whether the failure of the defendant to have life saving apparatus available on the deck of the barge**, the place from which efforts to rescue men overboard would ordinarily be conducted, **did not constitute negligence to which the failure of the effort to rescue decedent was attributable.**"

From a judgment for the defendant, the plaintiff

appealed. The case was reversed and remanded for a new trial.

Appellant contends, that considering the foregoing and other cases in this specification of error, that he is entitled to recover in the case at bar if the defendant's negligence played any part, even the slightest, in producing the injury. Appellant urges that much more than such a requirement is shown in the record in the instant case.

Appellant further urges that the evidence shows in the case at bar that this small twenty foot square hatch was improperly used to load these slingloads of long pieces of decking at the direction of the appellee's agent, because such hatch was not constructed or designed for such type of cargo, and a slider did fall out of a slingload going down such hatch, which resulted in appellant's injuries.

The fact that the record is silent as to whether such an accident ever happened before, and appellee's evidence that it was customary to load such cargo into this type of hatch, is immaterial, because the law is that customary practice cannot become proper care if such practice is itself negligent.

In the case at bar the appellee introduced evidence to show that it was customary to load such long pieces of decking in this same hatch on this vessel. (R.T. 232, 233, 234, 259, 260, 261, 265, 266).

Custom, under some circumstances, may establish the norm of care and caution, but a custom which in itself is negligent cannot ripen into proper and reasonable care and caution no matter how long it had been used. A negligent method of work, no matter how customarily employed, cannot excuse the appellee, who directed the cargo to be loaded into this small hatch, if in fact the method was negligent and likely to cause injury. This is a jury question. See **Texas & Pac. R. R. v. Behymer**, 189 U.S. 468; 23 S. Ct. 622; 47 L. Ed. 905 at **906**:

Then the case of **Elkton Auto Sales Corp. v. State of Maryland**, 53 F. 2d 8, 10 (5th Cir.) holds that negligence, if established, cannot be justified by custom.

Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, at 1296, 1297, holds that customary practice does not of itself negative negligence. The obligation is to do what should have been done—not what was usually done.

At pages 1297, 1298, the court says:

“Ordinary care must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect . . . It must be commensurate with known dangers. **Defendant created the place in which the work was done and supervised the doing of the work by plaintiff** and was aware for a period of at least sixteen years of the conditions under which plaintiff was

required to work and of the means and methods by which its work was accomplished."

We have a similar situation in the case at bar because appellee created the place in which the work was done and in effect supervised the doing of the work by instructing the stevedoring company to put such cargo into that small hatch, and knew how the cargo was loaded end first down such hatch.

This court, in **The Indien**, 71 F. 2d 752, at page 759 (9th Cir. 1934) holds that mere custom, without more, under the law, is not conclusive, quoting Mr. Justice Holmes in **Texas & Pacific R. R. v. Behymer**, 189 U.S. 468, 470, *supra*:

"What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

" * * * Negligence, if established, cannot be justified by custom," citing *Elkton Auto Sales Corporation v. Maryland* (C.C.A. 4) 53 F. 2d 8, 10 (and citing many other cases)"

In **Smith v. Shevlin-Hixon Co.**, 157 F. 2d 51 (CA 9th 1946), which also was an appeal from a directed verdict, this court says, from the opinion, at pages 53 and 54:

"It is hornbook law that, on a motion for a directed verdict, the evidence adduced by the opposing party shall be taken as true and all reasonable

inferences deducible therefrom shall be given their most favorable intendment. This rule is recognized in the jurisprudence of Oregon."

"In **Holland v. Hartwig**, 145 Or. 6, 10, 24 P. 2d 1023, 1024, the court said:

"The question may be further simplified by bearing in mind that in determining whether the cause should have been submitted to the jury, direct evidence of any fact or facts should be construed as proof thereof. Where any fact, even though disputed, is disclosed by direct evidence, such fact may support an inference, because, with respect to disputed testimony in solving the question here involved, it is not for the appellate court to determine what the truth is. This court has but to ascertain whether there is direct testimony which the jury could have construed as proving the fact in question."

"Again, in **Christie v. Great Northern R. Co.**, 142 Or. 321, 328, 329, 20 P. 2d 377, 380, the point was further elaborated:

"Upon motion for a directed verdict in favor of defendant, every reasonable inference that may be drawn from the testimony is to be resolved in favor of plaintiff * * *".

In the opinion, at page 57, this court says:

"Nor can the appellee excuse itself by urging that it could not have foreseen that the appellant would suffer the particular mishap that overtook her. In **McMillen v. Rogers**, 175 Or. 453, 154 P. 2d 219,

222, decided in December, 1944, the Supreme Court of Oregon quoted with approval the following language:

'* * * In order to render a party liable for the consequences of his wrongful act, it is not necessary that he should have contemplated or been able to foresee the precise form or manner in which the plaintiff's injuries would be received.'

Aune v. Oregon Trunk Railway, 151 Or. 622, 632, 51 P. 2d 663, 667.

"Liability for negligence is not predicated upon the necessity that the wrongdoer should foresee that an injury would result from his wrongdoing. It is sufficient that in view of all the circumstances, he should have foreseen that his negligence would probably result in injury of some kind to someone." Horne v. Southern Railway Co., 186 S.C. 525, 197 S.E. 31, 36, 116 A.L.R. 745.

"* * * It is not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye" Shearman and Redfield on Negligence, Revised Edition, Vol. One, pages 55 to 58, inclusive.

Continuing on page 57, this court says:

"The evaluation of 'all the circumstances' and the application of the criterion of what would be 'clear to the ordinarily prudent eye' are, under the Anglo-American system of law, peculiarly within the province of the jury. It is in the jury box rather than in an appellate court that the law prefers such practical and everyday tests to be made."

Continuing, at pages 59 and 60, this court says:

"Just as precise foresight of the particular injury is not necessary to render one liable for the consequences of his wrongful act—a doctrine approved in *McMillen v. Rogers*, supra, 175 Or. 453, 154 P. 2d 219—so is such precise foresight unnecessary 'in order to constitute a particular act of proximate cause of the injury.' *Miami Quarry Co. v. Seaburg Packing Co.*, 103 Or. 362, 371, 204 P. 492, 495. It is sufficient if the wrongdoer could have reasonably anticipated that some injury might result.

"The learned judge below recognized that 'it is usually said that the question of causation is a jury question.' He failed to make it clear, however, why the instant case was an exception to the rule."

"The Supreme Court of Oregon has been emphatic in declaring that causation is a matter for the jury to determine. *Ludwig v. Zidell*, 167 Or. 488, 496-500, 118 P. 2d 1073, 1077 . . . 'whether the installation of such protective guard or housing could have been made without impairing the efficiency of the machine is a question of fact. **Involved collaterally** in considering the question of practicability of proposed methods of guarding the machine is **the question whether the failure to have installed such or any covering or guard was the proximate cause of plaintiff's injury. That too is a question of fact.**'"

This court then reversed the lower court and remanded the case for a new trial.

In **Finn v. Spokane, Portland & Seattle Ry. Co.**, 241

P. 2d 876, 194 Or. 288, the Oregon Supreme Court holds that in determination of questions raised by motion for directed verdict, questions must be resolved upon consideration of all evidence and reasonable inferences derivable from evidence in light most favorable to plaintiff, **and in process of such determination, plaintiff is entitled to benefit, not only of his testimony, but also of any evidence favorable to him introduced by the defendant.**

In **O'Leary v. United States Line Company**, 215 F. 2d 708 at 715 (1 Cir. 1954) the court holds that:

"In making a motion for a directed verdict the defendant admits the truth of all facts which the jury might find in favor of the plaintiff, whatever the nature of the evidence. He admits that if the evidence conflicts, that of the plaintiff is true so far as it conflicts with his own. The court also will make any inference of fact in favor of the party offering the evidence which the evidence warrants and which the jury, with the least degree of propriety, might have inferred . . . (citing cases)."

In **Meyers v. Pittsburgh Steamship Co.**, (6 Cir., 1948), 165 F. 2d 642, the question involved was whether the owner of a ship in drydock for repair is under any obligation to avoid the creation of a hazardous condition on the drydock by reason of water discharged from the ship onto the drydock in freezing weather, which resulted in injuries to plaintiff. The trial court directed a verdict in favor of the defendant. The case also dis-

cusses a customary practice as not controlling on the issue of negligence. The opinion, at page 644, reads:

"The traditional and established test of negligence is, of course, the conduct of a reasonably prudent man in like circumstances, and it has long been settled that a finding of negligence is warranted even from an act not amounting to wanton wrong whether injury in some form ought to have been foreseen in the light of attendant circumstances." (citing many authorities).

From the opinion at page 644:

"Applying these principles, a question of fact emerges from the record in this case which, upon applicable instructions, should have been submitted to the jury."

The directed verdict for the defendant was reversed upon appeal, and the case remanded for a new trial.

An Oregon case, **Jensen v. Salem Sand and Gravel Co.**, 192 Ore. 51, 233 P. 2d 237, (1951) involved an action for damages where plaintiff fell into a sewer ditch and was injured, which ditch had been excavated but partially refilled by defendant.

In discussing negligence, the court said:

"Whether or not the given act may be negligence or not negligence depends upon the circumstances, for, as said in *1 Beven on Negligence*, (3d ed.) at p. 9, 'it is not the act that connotes the negligence, but the circumstances.' As quoted by Mr. Justice Rand in *Rice v. City of Portland*, 141 Or. 205, 213,

7 P. 2d 989, 17 P. 2d 562, from Degg v. Milland Ry. Co., 1 H. & N. 781:

" 'There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person.' See, also, Grand Trunk Ry Co., v. Ives, supra, where the court said: " 'The terms 'ordinary care, 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence.' " (at page 58).

Biddle v. Mazzocco, 204 Or. 547, at 554, 284 P. 2d 364, at 368 (June 2, 1955), was a recent case decided by the Oregon Supreme Court and involved an action for damages for personal injuries arising out of an automobile accident.

In the opinion, at 554, Justice Tooze defines negligence as follows:

"Negligence, in the absence of statute, is defined as the doing of that thing which a reasonably prudent person would not have done, **or the failure to do that thing which a reasonably prudent person would have done in like or similar circumstances; it is the failure to exercise that degree of care and prudence that a reasonably prudent person would have exercised in like or similar circumstances.**"

Sullivan v. Shell Oil Company (9th Cir., 1956) 234 F. 2d 733 was an action for damages for personal in-

juries based on negligence. Jurisdiction of the District Court was based on diversity of citizenship, as in the case at bar.

At page 741, from the opinion, this court says:

"This court in a diversity case is required to determine California law on our precise question."

This court also followed Oregon law on negligence in **Smith v. Shevlin-Hixon Co.**, *supra*.

The foregoing propositions involved several of the charges of unseaworthiness and negligence against appellee (T. 3, 4, 5, 6, 7, 8, 19, 20, 21) and appellant contends that the evidence substantiated and proved one or more of such charges, so that it would be a question of fact for the jury to decide.

SPECIFICATION OF ERROR NUMBER TWO

The trial court erred as a matter of law in allowing and directing a verdict for said appellee, which was objected to by appellant, and having judgment entered thereon for appellee for the reason that the evidence affirmatively shows that the question of negligence in this case is a jury question.

ARGUMENT .

As suggested in the argument under Specification of Error Number One in this brief, the same facts, evidence, law and argument apply to this Specification Two as to Specification One, so appellant will not repeat such argument and authorities here.

Appellant further contends that section II, Rule 201 of the Pacific Coast Marine Safety Code (Exhibit 2) applies to the case at bar.

Such rule reads:

"The owners and/or operators of vessels shall provide safe ship's gear and equipment and a safe working place for all stevedoring operations on board ship."

As suggested in Specification of Error One, appellant pointed out that appellee agreed such safety code and rule applies to this case. (R.T. 210, 211).

When Mr. Charles Edward Hodges, with many years experience as superintendent of the shipping company representing appellee, testified that he was present on board the M/S Dalerdyk several times that day appellant was injured (R.T. 248) and knew about how the loading operation was progressing, the appellee thereby had notice about the dangerous conditions existing that day, and also knew about such dangerous conditions before that day on that same trip, in connection with loading these long heavy decking 3 x 6 timbers down this small narrow hatch where appellant was injured.

Mr. Hodges knew, or should have known, before such decking cargo was lowered on end down such hatch, that a slider would be apt to fall out of a sling

load (R.T. 240) and he could have stopped such loading operation into such No. 3 hatch before appellant was hurt, and ordered such decking timber loaded into either or both of the two larger hatches on this ship (R.T. 250), hatches 2 and 5 (R.T. 239), where it could be loaded crossways so a slider could not fall out of any slingload (R.T. 240). The record shows that the same decking was loaded into the two larger hatches (Exhibit 6).

As charged in appellant's complaint (T. 7, 8, 19, 20) it was the duty of the appellee, through its agent, Mr. Hodges

- (1) to provide appellant with a safe place to work;
- (2) to see that all working conditions were safe;
- (3) to see that said loading operation was carried on in a safe manner; and further,
- (4) appellee failed to stop such work and operation in order to avoid an accident and injury to appellant.

Appellant contends that the evidence affirmatively shows appellee did violate and disregard its duty to appellant in one or more of the respects as charged in such charges of negligence, so that the matter was a jury question, and not a matter of law for the trial judge to decide.

The case of **United States v Luehr and Jones Steve-**

doring Company, 208 F. 2d 138 at 140 (9th Cir. 1953) suggests that a violation of such a safety code would not constitute negligence per se, and **it would be a question of fact whether conduct under given circumstances constituted negligence.**

The case of **Feinman v. A. H. Bull S. S. Co.**, 216 F. 2d 393, at 396 (October, 1954) holds that the owner of the ship must furnish a safe place to work for a longshoreman, and that the owner must furnish a place that is reasonably safe for the duty to be performed by the longshoreman, and the fact that the longshoreman's employer has a concurrent duty to the same effect does not excuse the shipowner from also meeting his obligation to furnish the longshoreman a safe place to work. The longshoreman in the Feinman case was struck by a falling hatch beam while working on board ship.

In **U. S. v. Arrow Stevedoring Co.**, 175 F. 2d 329 (9th Cir. 1949) a stevedore was injured working on board ship resulting from an unsafe method of doing the work. The stevedore company was employed by the government to unload naval cargo on the U.S.S. Edgecomb and the stevedore was employed by such company.

In the opinion Judge Denman refers to the proposition that the government is liable to the stevedore because it had a continuing duty to him to see that at all times he had a safe place to work, and is liable to

him for a failure to keep the vessel seaworthy in that regard. "Such liability exists even though the sole proximate cause of such unseaworthiness and the injury to Williams was not the defect in the hatch cover, but, as the government claims, its conscious use with knowledge of its defect, by the stevedore's superintendent in a way making it dangerous and causing the injury to Williams." 175 F. 2d 329, 330.

Judge Denman, at page 330, then says:

"It is not questioned that though the unseaworthiness condition arising from negligent use of the hatch cover was not caused by the government's fault, it is nevertheless liable. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90, 66 S. Ct. 872, 90 L. Ed. 1099."

In the case of **Pope & Talbot, Inc. v. Hawn**, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, negligence and unseaworthiness were alleged to be the cause of the plaintiff's injuries, among other things, the court held that the shipowner owes a carpenter, who was a business invitee, the duty of providing him with a reasonably safe place to work. (See **Hawn v. Pope & Talbot, Inc.** 198 F. 2d 800, at 803).

The same duty was present during all times the appellee longshoreman was on board the M/S DALERDYKE, and appellee owed Mr. Phipps the duty of providing him with a reasonably safe place to work.

It is a jury question if appellee violated such duty.

SPECIFICATION OF ERROR NUMBER THREE

The trial court erred as a matter of law in allowing and directing such verdict for appellee in that the evidence shows that appellee, by telling the stevedore company by whom appellant was employed where to put and stow such decking cargo, thereby improperly directed appellant to work in an unsafe and dangerous place, which charge of negligence would be a jury question.

ARGUMENT

As before suggested, the witness Hodges, or his supercargo, told the stevedoring company the appellee employed in what hatches of the Dalerdyk to load all cargo before and at the time appellant was injured (R.T. 250).

It then would follow that thereby appellee by so doing improperly directed appellant to work in an unsafe and dangerous place as a member of a gang of longshoremen, who were all business visitors, engaged to load such decking cargo in No. 3 hatch.

The argument and authorities cited in Specification of Errors One and Two of this brief apply to this assignment and will not be repeated now.

SPECIFICATION OF ERROR NUMBER FOUR

The trial court erred as a matter of law in allowing and directing such verdict for appellee in that the evi-

dence shows that it was a jury question whether said vessel was unseaworthy by reason of the way such No. 3 hatch was constructed and used for such lumber loading operation, in that such hatch was too small and too dangerous and unsafe for loading and stowing such large slingloads of long random length heavy pieces of timber end first down said small hatch.

ARGUMENT

Appellant again believes and urges this court that the same facts, authorities cited, and argument contained in Specification of Errors One and Two of this brief also apply to this Specification of Error Number Four, without the necessity of repeating them here.

SPECIFICATION OF ERROR NUMBER FIVE

The trial court erred as a matter of law in allowing and directing such verdict for appellee in that the evidence shows that it was a jury question whether appellee improperly used said small No. 3 hatch by causing and directing said large loads of long pieces of decking to be loaded into said hatch end first, when appellee knew or should have known by the exercise of reasonable care that such operation was extremely dangerous and liable to result in injuries to longshoremen, including appellant, working in such hatch, and when such vessel then had two other larger hatches which were available, and which could have been used

to load and stow such decking by lowering it crossways, and thereby make it a reasonably safe operation and avoid injuring appellant.

ARGUMENT

To save repetition, appellant again suggests to this court that the same facts, authorities cited, and argument contained in Specification of Errors One and Two of this brief apply to this Specification of Error Number Five, without repeating same at this time.

SPECIFICATION OF ERROR NUMBER SIX

The trial court erred in refusing to admit in evidence a picture of one of the large hatches on the *M/S Dalerdyk*, appellant's Exhibit 4-a; and the trial court also erred in refusing to admit in evidence testimony of several of appellant's witnesses regarding the proposition that if these large slingloads of random length decking lumber were loaded flat or crossways into such large hatch, with two slings, then a slider could not come out of such slingloads, and thereby it would be a much safer operation and appellant would not have been injured; offers of proof were made by appellant regarding such evidence, and not allowed by the trial judge; considering that one of appellee's expert witnesses, Superintendent Charles E. Hodges, did testify on cross examination that a slider could not come out of a slingload if loaded flat.

ARGUMENT

This specification of error actually involves one general proposition, so it will be presented in that manner to shorten this brief.

The picture of the hatch referred to, appellant's Exhibit 4-A (R.T. 15, 20), and the refusal of the trial judge to admit in evidence the additional testimony of the witnesses Tovey, Roberts, Goertzen and appellant, as to what difference could there have been in this operation of loading these particular dimensioned timbers so that it would have prevented or avoided this accident happening (R.T. 105, 106, 120, 121, 171, 172, 178, 179, 206, 207, 214, 215, 216), and the offer of proof to the effect that such timbers or decking could have been loaded into one or two larger hatches of the ship flat or crossways with two slings on a slingload, so that sliders could not have come out of such slingloads while being lowered down in the hold or hatch (R.T. 214, 215, 216), all goes to prove and substantiate appellant's charge of negligence upon this proposition (T. 4, 20, 21), and raises questions of fact for the jury.

The authorities cited and discussed in Specification of Error Number One in this brief, **regarding negligence**, also apply to this specification of error, so they will not be repeated here.

Arthur v. Parish, 47 P. 2d 682, 150 Or. 582, was a

case involving a jury trial in an action on a promissory note. The execution and delivery of the note was admitted, but the amount due was denied. The defendant alleged partial payment in his Answer, which was denied in the Reply. The trial judge excluded testimony as to what the deceased owner of the note said to a witness about the defendant's answer to an inquiry over the telephone concerning payment of the note sued on.

In the opinion, at pages 590, 591, the court says:

"In view of evidence of declarations against the interest of the deceased, we think the witness should have been permitted to testify to what the decedent said about the defendant's answer to the inquiry concerning payment of the note * * *. Payment of the note was a vital issue in the case and it may be that the jury would have reached a different conclusion had the declaration of decedent in his favor been admitted in evidence. **No offer of proof is necessary as the matter arose on cross-examination.**

"In our opinion, the trial court also erred in excluding certain memoranda, marked for identification as plaintiff's exhibits 7 and 8, made by the deceased in his own handwriting, pertaining to the notes involved in this litigation. These exhibits were in the nature of declarations in favor of the decedent. * * * It follows that the order of the lower court setting aside the judgment and granting a new trial is affirmed."

Then in regard to the proposition of the error of the

trial judge in sustaining objections to questions asked of witnesses on direct examination by counsel for appellant, the Oregon case of **Boord v. Kaylor**, 114 Or. 62, 234 Pac. 263 is applicable.

In the opinion, at page 65, the court says:

"Assignments of error numbered five, six, eight, nine and eleven pertain to rulings of the court in sustaining objections to questions asked of witnesses on direct examination by counsel for the defendant. In view of the fact that the record does not disclose the information expected to be elicited by the answers, we cannot say that the interests of the defendant were materially affected. Counsel should have made a showing of what was expected to be proved by the answers to these questions, and the same should have been incorporated in the bill of exceptions."

Boord v. Kaylor, 114 Or. 62, 234 Pac. 263, *supra*, is followed with approval in **Burgess v. Charles A. Wing Agency**, 139 Or. 614, at 624, 11 P. 2d 811, where the court holds that an offer of proof must follow ruling excluding evidence on direct examination before ground for reversal will be present.

In the case at bar, it will be seen that appellant complied with the law on this subject as determined by the Oregon Supreme Court.

SPECIFICATION OF ERROR NUMBER SEVEN

That the trial court erred in restricting cross examination and refusing to allow appellee's witness Charles

E. Hodges to answer the following question upon cross-examination:

"Q. I mean, this rough lumber, that 3½ or 3 by 6 stuff with random lengths up to 30, 40 feet long in one slingload and you had about 18 pieces to a slingload. You couldn't have a slider if you loaded it flat, could you?

"A. Not very well, no.

"Q. Yes, that would be a lot safer operation than if you get that same deal end-first down the Booby Hatch, wouldn't it?

"The Court: Don't answer.

"Mr. Brooke: I object to that.

"The Court: The objection will be sustained. The question is not what would have been a better way; the question is whether or not they were negligent in loading the hatch in the way it was loaded." (T. 240, 241).

ARGUMENT

Appellant again contends that in regard to the foregoing proposition it is obvious what the witness would have answered to the question objected to, because in response to another question quoted, he had just answered that you couldn't have a slider fall out of a slingload of decking if you loaded it flat.

In addition to the facts, cases and argument under Specification of Error Number One in this brief applying to this Specification of Error Seven, the Oregon

case of **Arthur v. Parish**, 47 P. 2d 682, 150 Or. 582, at 590, 591, *supra*, is applicable, which is discussed in Specification of Error Number Six in this brief, which holds that no offer of proof is necessary, as the matter arose on cross examination.

SPECIFICATION OF ERROR NUMBER EIGHT

That the trial court erred in restricting cross examination and refusing to allow appellee's witness Herman Larsen to answer the following question upon cross examination:

"Q. Captain Larsen, assuming that you have a slingload of this 3 x 6 dimension rough decking, lumber, at random lengths about 2 feet square, and the lengths are up to, approximately, 35 feet—a little more or less—some of the sticks, and you take a load like that—a slingload, and you put two slings on it about 8 feet apart. That would be approximately 4 feet off-center for each sling, you know, this way (attorney demonstrates). You understand what I mean, don't you?

"A. Yeah; I understand.

"Q. Then, the winch drivers would take that particular slingload over from the dock, over the deck, and then they'd take this and put it down flat or crossways into this hatch which was 36 feet long, we will say, on that particular ship. Now if they did it in that method, you could not possibly have a slider come out, could you?

"Mr. Brooke: If your Honor please, I object to that as having no pertinency to the case.

"The Court: Yes. The Court has ruled on that on several occasions. Your objection will be sustained.

"Mr. Conway: Well, the witness yesterday testified about that, your Honor, on cross examination. Mr. Hodges———

"The Court: I understand.

"Mr. Brooke: I wasn't quick enough on my feet. I guess.

"The Court: There wasn't any objection made.

"Mr. Conway: That's all. Thank you.

"Mr. Brooke: That's all.

"The Court: That is all, sir. You may step down."
(T. 262, 263).

ARGUMENT

In addition to the facts, cases and argument under Specifications of Error Numbers One and Seven in this Brief applying to this Specification of Error Number Eight, appellant further suggests that it is a physical fact that a slider cannot come out of a slingload if it is loaded crossways or flat down a hatch on a loading operation of the kind involved in the case at bar. That makes a safe operation as far as sliders are concerned.

SPECIFICATION OF ERROR NUMBER NINE

That the trial court erred as a matter of law when he failed, after being requested by the clerk, to sign a pre-trial order in this case, which was agreed to by all counsel in writing, and lodged and filed with the

Clerk of the United States District Court as of March 25, 1957, and which fact was not ascertained for the first time by counsel until on or about January 15, 1958, as such pre-trial order was used by the trial judge at the trial of this case as if it had been executed by such trial judge.

ARGUMENT

Appellant would like to be enlightened as to the above matter of practice in this Circuit, or in the District of Oregon, as the problem arose when opposing counsel and the writer were checking over the record and exhibits on or about January 15, 1958, in the office of the Clerk of the District Court at Portland, Oregon.

One of the deputy clerks then presented such pre-trial order to the trial judge for his signature, after we found out he had not signed it, but he didn't sign it, and neither opposing counsel or the writer know why the trial judge didn't sign such pre-trial order.

The trial judge used and referred to such pre-trial order during the trial from time to time, as shown in the transcript of proceedings (R.T. 17, 156, 210, 211, 212, 213, 215, 229, 271, 272, 273, 274, 286, 287, 304, 305, 307, 308).

CONCLUSION

In conclusion, it is submitted that the trial court erred with respect to each specification of error presented in this brief, and that this case should be reversed and remanded for a new trial in all respects, with costs to appellant in both courts.

Respectfully submitted,

JOHN F. CONWAY,
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Portland 4, Oregon.

APPENDIX

Exhibits in Case

Plaintiff's	Identified	Offered and Received	Rejected
2	Pacific Coast Marine Safety Code T-211	T-211-212	
3-A	X-ray film, T-132	T-132	
4	Photograph, T-14	T-212	
*4-A	Photograph, T-14	T-212	T-20, 100
4-B, C	Two Photographs, T-74	T-83	
4-D, E, F, G, H. I, J	Seven 35-mm Kodacrome slides, T-49, 136	T-152	
5	St. Vincent's Hospital Records on Mr. Phipps, T-44	T-44	
6-A, B, C	Income tax returns for 1952, 1953 as amended and 1954 for Kenneth J. Phipps and Edith R. Phipps, respectively, T-157	T-189	

Defendant's

6	Booklet designated as Vessel's Loading Record, T-252	T-256
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The transcript and pages above referred to refer to the reporter's transcript of proceedings in this case.

United States
COURT OF APPEALS
for the Ninth Circuit

KENNETH J. PHIPPS,

Appellant,

vs.

N. V. NEDERLANDSCHE AMERIKANSCH
STOOMVART, MAATS, a Corporation, also
known as HOLLAND-AMERICA LINE,

Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

WILLIAM G. EAST, Judge

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FILED

MAY 29 1958

PAUL P. O'BRIEN, CLERK



SUBJECT INDEX

	Page
Statement of the Case	1
Summary of Argument	3
Argument	3
The Court Correctly Directed a Verdict for Defendant	3
No Unseaworthiness	3
No Negligence	4
Argument	5
Exclusion of Evidence—Summary of Argument	11
Argument	11
Appellant's Authorities	13

CASE INDEX

Berti v. Compagnie de Navigation Cyprien Fabre, 213 F.(2d) 397.....	7
Doucette v. Vincent, 194 F.(2d) 834, 837.....	12
Dwyer v. National Steamship Co., 17 Blatchford 472 (4 Fed. 493).....	5
Gallagher v. U. S. Lines Co., 206 F.(2d) 177.....	6
Hawley v. Alaska Steamship Co., 1956 A.M.C. 1877	10, 13
Salmond v. Isbrandtsen Co. Inc., 1955 A.M.C. 2334....	9
Warner v. Synes, 114 Ore. 451.....	9

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*Appeal from the United States District Court for the
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WILLIAM G. EAST, Judge

STATEMENT OF THE CASE

Phipps, a longshoreman employed by W. J. Jones & Sons, Inc., master stevedore, was injured by a piece of lumber which fell from a sling load which the stevedore was loading into No. 3 hatch on defendant's ship, the DALERDYK. The hatch where he was working is known sometimes as a trunk hatch or a tunnel hatch. It was about 20 feet square and continued downward vertically in that dimension until it reached the hold, from which point it extended forward in a "tunnel"

about 40 feet long and about 10 feet high, the full width of the ship. The lumber was being stowed in this tunnel and there was plenty of room to work there and plenty of room for the longshoremen to step inside the tunnel and thus be out of the way of sling-loads being lowered down through the 20-foot square of the hatch. The loads were rough lumber, 3×6 s, 15 to 20 pieces in a sling load, from 24 to 36 feet long, with an occasional stick possibly 40 feet. Because of the length of the loads they had to be tilted to go down the hatch, and this was accomplished by fastening the sling a little bit off-center of the load so that the load hung at an angle. The sling was equipped with a device which tightened up on the load, and, except in this one instance, firmly bound the pieces together. This is a usual and very common method of loading long lengths of anything whether steel rails, long timbers, or anything else, into cargo hatches. The details of the work were entirely in the hands of the master stevedore. The appellee had nothing to do with them at all. The only thing the appellee did, through its agent, was to designate the hatches into which the cargo was to be stowed. There was no failure of any ship's gear of any kind whatever. There were various allegations of unseaworthiness and negligence. They are set forth on pages 8 and 9 of Appellant's Brief. But the substance of plaintiff's complaint was that the defendant was negligent in directing the stevedore to stow the lumber in this particular hatch, and that the hatch was "unseaworthy" to receive lumber of that length. The Trial Court decided that plaintiff had not sustained any of his allegations, and directed a verdict for defendant.

SUMMARY OF ARGUMENT

Appellee is not liable for injuries sustained by an employee of an independent-contractor-stevedore in the normal course of the work, where there is no proof of any negligence of the appellee or unseaworthiness of the ship contributing to the injuries. The Court correctly directed a verdict for defendant.

ARGUMENT

Before proceeding to the main argument we notice the statement on page 15 of Appellant's Brief:

"Appellant contends that the same rule followed by the United States Supreme Court in Jones Act and Federal Employers' Liability Act cases, under its broad interpretation of common law standards as to negligence, also applies in the case at bar."

It is well known that, since the Jones Act applies only to employer and employee relations, and since a longshoreman is not an employee of the shipowner, the Jones Act has no application.

THE COURT CORRECTLY DIRECTED A VERDICT FOR DEFENDANT

No Unseaworthiness

There was no evidence of any unseaworthiness. No evidence of any failure or defect in the vessel or its equipment. All the evidence showed the vessel's gear was operating properly. Following the accident, loading resumed at the hatch involved. There was no necessity

to repair or alter the vessel's loading gear before loading resumed. The record is void of any evidence of unseaworthiness.

No Negligence

The record is also void of any evidence of negligence. All the evidence shows that loading of cargo such as lumber, pipe, girders, rails, is often brought into a vessel's hold on one sling. All the evidence shows this can be done without sliders.

In fact, on this very ship, the evidence shows that on six other voyages lumber cargo had been stowed in the No. 3 hatch in essentially the same way (that is, tilted and on one sling) without accident. Further, following the accident the stevedore company resumed loading at the No. 3 hatch and filled the hatch with the same lumber cargo as they were loading before the accident.

The stevedore company hired by the defendant to load its vessel was W. J. Jones & Son, Inc. That company has been in the stevedore business in the Northwest over 30 years. During that time it obtained a substantial share of the stevedore business in the area, and of that share a substantial part has been lumber cargo. The record shows beyond question that the defendant hired a competent and experienced stevedore company. In addition, W. J. Jones & Son had loaded this very vessel on six other occasions and each time lumber cargo was loaded into the No. 3 hatch in essentially the same manner.

In summary, the defendant hired a competent and experienced stevedore company to load its vessel. The stowage of the lumber cargo in the vessel's No. 3 hatch required the stevedore company to bring the lumber in tilted and on one sling. This is a common practice in the shipping industry, and can be done in safety. It was the stevedore company's job to avoid sliders. It was in charge of the details of the loading. Following the accident, loading resumed at No. 3 hatch, and it was filled without change or repair of the vessel's gear or equipment.

ARGUMENT

The question presented in this case is a very simple one—is a defendant shipowner whose ship's appliances are all in order, and who has no control over the method or details of the stevedore's work, liable for an injury to an employee of that stevedore, sustained in the normal loading of the vessel?

The answer clearly is, that he is not. The stevedore is an independent contractor. It is he who employs the longshoremen, furnishes part of the loading gear, and directs their work.

The authorities are very clear on this, and under the long-established law of independent contractor, could not be otherwise.

As long ago as *Dwyer v. National Steamship Co.*, 17 Blatchford 472 (4 Fed. 493), Judge Benedict, the eminent judge who was the father of Benedict's Admiralty, in a case where a fatal injury was caused by the negli-

gence of an independent stevedore-contractor, and where an attempt was made to hold the steamship company liable, ruled otherwise and closed his opinion with this quotation:

“If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable.” Blatchford (p. 478).

Coming to the more recent cases:

In *Gallagher v. U. S. Lines Co.*, 206 F.(2d) 177, Gallagher, a longshoreman, was injured by a bale of cargo falling from an “airplane skid” being used by his employer, Hogan, the independent stevedore. (Just as Phipps was here struck by a falling piece of cargo). The stevedore contract provided that the equipment to be used in loading should be “such equipment approved by the Owner as is best adapted for the proper and safe handling of the cargo, passenger baggage, and mail.” It was on the basis of this that Gallagher sued the shipowner, on the theory that the airplane skid was improper equipment. The Court of Appeals for the Second Circuit held that this phrase was not intended to reserve to the shipowner any detailed control of the work that would make it liable for such an injury, but was only to insure that Hogan, the stevedore, complied with its contract to do the stevedoring work on the owner’s vessels. In the course of the opinion the Court stated the law of independent contractors:

“Thus, a general inability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the contract

does not of itself make the hirer of an independent contractor liable for harm resulting from negligence in conducting the details of the work, . . ." (p. 179)

The Trial Court had submitted to the jury the question whether the shipowner should have prevented Hogan from using the airplane skid, and on this question the jury rendered a verdict against the shipowner of \$250,000. This, the Court of Appeals said was error, and reversed the case with directions to enter a judgment in favor of the shipowner, saying,

"Responsibility for the method of discharging the cargo was left entirely to Hogan; the only proviso was that it must be done to the 'owner's satisfaction'." (p. 180)

In *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 F.(2d) 397, Berti, a longshoreman employed by the American Stevedores, Inc., an independent contractor, who was standing on a hatch-cover, was dumped into the hold when a winch cable dislodged a supporting beam. He sued the shipowner, alleging unseaworthiness in the beam and the cable, and negligence for failure to provide safe equipment and adequate inspection and adequate supervision for the loading. The Trial Court, in instructing the jury, told them that "the master of the ship is still in charge and that those underneath him could have *stopped the work* if they thought that what the plaintiff was doing was unsafe. They could not tell him how to do the work, but they could stop him from continuing to do it if they felt there was a danger or hazard in connection with the work" (p. 399). (It is one of the allegations in the present case that defendant Holland-America Line should have stopped

the work — "Defendant-appellee failed to stop said work." Appellant's Brief, p. 8).

The Court of Appeals held that this instruction was error. It said:

"The inference appears unmistakable that Cyprien could be found liable, despite fully adequate equipment, solely on the basis of its failure properly to supervise the operation. This we think was fatal error."

In the present case it is one of the contentions that Hodges, the appellee's local agent, was on the ship from time to time on the day of the accident. In this connection the following quotation from Berti is pertinent:

"American relies heavily on the fact that two of Cyprien's men were present at the hatch supervising distribution of the cargo and guarding against pilfering. But there is no evidence that they were in any other way concerned with the manner in which American performed its work."

and the Court then quotes the language from the Gallagher case, which we have already set forth. Of course Hodges had nothing whatever to do with the manner in which Jones, the independent stevedore, did the loading. All Hodges did was "to see that the cargo gets to the ship," but as to the method of loading, "We don't have any control of that" (Tr. 248).

In the Berti case the Court further enunciated the true doctrine:

"If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien." (p. 400)

And again,

“As for the manner in which the work was performed, and any resulting transitory conditions, such as the partly covered hatch, which may have been unsafe, American’s assumption of control relieved Cyprien of responsibility.” (p. 401)

In *Salmond v. Isbrandtsen Co. Inc.*, 1955 A.M.C. 2334, the Appellate Division of the New York Supreme Court considered the case where American Stevedores Inc., as an independent contractor, was removing some concrete ballast from a ship belonging to Isbrandtsen Co. A piece of the concrete broke off the block while it was suspended in mid-air, just as the lumber broke out of the sling-load here, and struck and injured one of the stevedore’s employees.

“The details of the work were under the complete supervision of American and plaintiff’s injuries resulted solely from the manner in which the work was done under American’s supervision. . . .

“There is no proof either that the vessel, or its equipment, or any of its appliances was defective, or that the equipment used was not reasonably fit for the use for which it was intended. Plaintiff’s employer was in sole control of the details of the work, and plaintiff’s injuries resulted solely from the manner in which the work was done under his employer’s supervision. Under such circumstances, there is no liability either on Isbrandtsen or on Bethlehem.” (p. 2335)

For an Oregon case discussing these principles learnedly and at length, see *Warner v. Synes*, 114 Ore. 451.

Hardly anything more need be said. The work here was under the complete control of Jones. The work was not inherently dangerous, but was done in the

customary and long-used manner, the recognized way of loading long lengths into the hatches of a ship. The working area was not confined or dangerous. The men had a tunnel 40 feet long, and in width as wide as the ship in which to work, and out of the way of descending loads. One of the men themselves described it as "quite a bit of floor area . . . a big one" (Tr. 29).

Appellant claimed that appellee did not furnish a "safe place to work" (that much-abused phrase). There was absolutely no proof of this. The fact that the slider slipped out of the load while in the control of the stevedore is no proof whatever that the appellee failed in its duty to furnish a safe place to work. That duty at most would be to furnish safe ship's gear and equipment for the loading.

Although it is unnecessary for the appellee to resort to it, the case of *Hawley v. Alaska Steamship Co.*, in this Court, 1956 A.M.C. 1877, held that a space of "only two or three feet between the edge of the hatch coaming and the tiers of salmon behind him" was enough and constituted a safe place to work (p. 1879).

Appellant's claim that the lumber should have been loaded into the larger hatches on the ship is irrelevant. A ship has to load its cargo with reference to many things—contamination from other cargo taint, odors, etc.; leakage; proper trim of the ship; accessibility of the cargo for discharge in rotation at the various ports of call; and many other things. The question is not whether the long lengths could have been loaded, as contended, more safely in the larger hatches. The question, as the

Trial Court properly held, was merely whether the appellee was guilty of negligence because it ordered this cargo to be loaded in the smaller hatch. And there was absolutely no such proof of such negligence. The appellee left the details to the stevedore and from then on it was up to him.

Incidentally, hatches on the ship were stated by Mr. Hodges to have been:

“No. 1 is about, oh, about 20 by 24. I think No. 2 is about 20 by 36. No. 3 is about 20 by 20. No. 4 is about 16 by 20. No. 5 is about 20 by 36. 6, I believe, is about 20 by 30.” (p. 239)

In view of this it is evident that no long lengths could have been lowered into any of these hatches without tilting them on a single sling, although it is possible that the shorter lengths may have been loaded on double slings.

EXCLUSION OF EVIDENCE SUMMARY OF ARGUMENT

The Trial Court properly excluded plaintiff's proffered evidence that the larger hatches could have been used instead of the tunnel hatch.

ARGUMENT

The Trial Court excluded plaintiff's proffered evidence that the larger hatches on the ship could have been used with greater safety. The Court was correct. Whether they could have been used or not was not the question in issue.

“It is clear on principle and fully established by the authorities that evidence of the existence of better or safer machines or appliances is not admissible for the purpose of establishing the legal standard for conduct in negligence cases.” *Doucette v. Vincent*, 194 F. (2d) 834, 837.

Its admission for other purposes is discretionary.

While this sort of evidence “is never admissible for the purpose of fixing the substantive legal standard by which to measure a defendant’s conduct, it is admissible in the discretion of the trial court, if accompanied by suitable cautionary instructions. . . .” (*Id.* p. 838). Continuing, the Court said:

“ . . . Thus a trial court may exclude it if in that court’s opinion the evidence, while relevant, would be of too little value in comparison with the prejudice it would create, the surprise it would cause, or the confusing ancillary issues it would raise. . . .” (*Id.* p. 838)

So here, if evidence as to use of the larger hatches had been admitted, it would have raised the collateral and ancillary issues as to whether additional lumber loaded there, and not in the tunnel hatch, would have affected the trim of the ship, whether there was room in the larger hatches for this additional lumber, whether it might have affected other cargo in those larger hatches either from the taint of green lumber or the weight of such lumber superimposed on other cargo, and particularly whether loading this particular lumber in those hatches could have been done at all, considering the necessity, in all shipping operations, of loading cargo so that it may be conveniently reached for discharge at the port of call for which it is destined.

The evidence, therefore, was not admissible to establish a rule of conduct, and if admissible for any purpose at all, it was in the discretion of the Trial Court to admit it or reject it. The Trial Court rightly chose to reject it.

APPELLANT'S AUTHORITIES

Appellant cites many cases in support of the rule that if there is any evidence in support of plaintiff's claim, the case must go to the jury.

But here there was no such evidence.

While evidence of negligence, even slight negligence, if proximately causing the injury, can carry the case to the jury, it must not be forgotten that the evidence of such negligence must be more than a scintilla. It must be *substantial* evidence. *Hawley v. Alaska Steamship Co.*, 1956 A.M.C. 1877, at page 1880. There was none here.

On all counts the judgment of the Trial Court, entered on a directed verdict, should be affirmed.

Respectfully submitted,

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*Note: See additional
pages center of this volume*

No. 15858

**In the United States Court of Appeals
for the Ninth Circuit**

ARTHUR EARL MCKNIGHT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLEE

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FILED

MAY 19 1958

PAUL P. O'BRIEN, CLERK

INDEX

	Page
Statement.....	1
Statutes and regulations involved.....	5
Argument:	
I. The United States is entitled to indemnity from the defendant from the defendant for the loss which it suffered as a guar- antor of his loan.....	10
A. Defendant is bound by a valid regulation to indemnify the United States for its loss.....	10
1. The regulation requiring indemnity is valid....	11
2. The regulation is binding upon defendant....	23
B. The Government's right to indemnity from the de- fendant is in no way impaired by provisions of California law barring deficiency judgments.....	26
1. The Government is suing upon an independent contract of indemnity, and not for a defi- ciency judgment.....	26
2. In any event, the Administrator's right to in- demnity arises under federal law, and can- not be impaired by a state statute.....	30
II. The district court properly computed the amount of the loss suffered by the United States.....	32
1. The transactions involved.....	32
2. The applicable law.....	34
Conclusion.....	36

CITATIONS

Cases:

<i>Allen v. Grand Central Aircraft Co.</i> , 347 U. S. 535.....	19
<i>Bank of America Nat. Trust & Savings Assn. v. Hunter</i> , 8 Cal. 2d 592, 67 P. 2d 99.....	27, 28
<i>Berman v. One Forty-Five Belmont Ave. Corp.</i> , 109 N. J. Equity 265, 156 A. 830.....	34
<i>Billings v. Truesdell</i> , 321 U. S. 542.....	11
<i>Brooks v. Dewar</i> , 313 U. S. 354.....	19
<i>Case v. Los Angeles Lumber Co.</i> , 308 U. S. 106.....	13
<i>Clafin v. Houseman</i> , 93 U. S. 130.....	31
<i>Clearfield Trust Co. v. United States</i> , 318 U. S. 363.....	30
<i>Colgate Co. v. United States</i> , 320 U. S. 422.....	11
<i>Commissioner v. Flowers</i> , 326 U. S. 465.....	19
<i>Corn Products Co. v. Commissioner</i> , 350 U. S. 46.....	19
<i>Everts v. Matteson</i> , 132 F. 2d 476.....	27
<i>Federal Crop Ins. Co. v. Merrill</i> , 332 U. S. 380.....	11, 15, 23, 24, 25

(1)

Cases—Continued

	Page
<i>Federal Land Bank v. Bismarck Lumber Co.</i> , 314 U. S. 95-----	31
<i>Ferguson v. Union National Bank</i> , 126 F. 2d 753 (C. A. 4)-----	13
<i>Fleetwood Acres v. Federal Housing Administration</i> , 171 F. 2d 440 (C. A. 2)-----	13
<i>Fleming v. Mohawk Co.</i> , 331 U. S. 111-----	19
<i>Gehlert v. Smiley</i> , 114 S. W. 2d 1029 (Mo.)-----	34
<i>General Auto Truck Co. v. Rust</i> , 88 F. 2d 774 (C. A. D. C.)-----	34
<i>Graves v. N. Y. ex rel. O'Keefe</i> , 306 U. S. 466-----	31
<i>Great Northern Ry. Co. v. United States</i> , 315 U. S. 262-----	11
<i>Hatch v. Security-First Nat. Bank</i> , 19 Cal. 2d 254, 120 P. 2d 869--	28
<i>Hecht v. Malley</i> , 265 U. S. 144-----	19
<i>Helvering v. Winnmill</i> , 305 U. S. 79-----	19
<i>Home Owners Loan Corporation v. Wilkes</i> , 130 Fla. 492, 178 So. 161-----	13
<i>Joe Balestrieri & Co. v. Comm'r</i> , 177 F. 2d 867 (C. A. 9)-----	12
<i>King v. Pomeroy</i> , 121 Fed. 287 (C. A. 8)-----	13
<i>Loeb v. Christie</i> , 6 Cal. 2d 416, 57 P. 2d 1303-----	28
<i>McCulloch v. Maryland</i> , 4 Wheat. 316-----	31
<i>McNally v. Hill</i> , 293 U. S. 131-----	13
<i>Mangano v. Guaranty Building & Loan Assoc.</i> , 4 Cal. App. 2d 608, 42 P. 2d 329-----	34
<i>Mitchell v. Covington Mills</i> , 229 F. 2d 506 (C. A. D. C.), certiorari denied, 350 U. S. 1002-----	19
<i>Mortgage Guarantee Co. v. Sampsell</i> , 51 Cal. App. 180, 124 P. 2d 353-----	28
<i>National Lead Company v. United States</i> , 252 U. S. 140-----	18
<i>Norwegian Nitrogen Co. v. United States</i> , 288 U. S. 294-----	11, 15, 19
<i>Pack v. United States</i> , 176 F. 2d 770 (C. A. 9)-----	30
<i>Pennsylvania Ave. Fed. Sav. & Loan Assoc. v. Fedder</i> , 175 Md. 127, 199 A. 785-----	34, 35
<i>Perego v. Dodge</i> , 163 U. S. 160-----	13
<i>Pittman v. Home Owners' Corp.</i> , 308 U. S. 21-----	31
<i>Ramsden v. Keene Five Cents Savings Bank</i> , 198 Fed. 807 (C. A. 8), certiorari denied, 196 U. S. 638-----	34
<i>Roland Co. v. Walling</i> , 326 U. S. 657-----	11
<i>Royal Indemnity Co. v. United States</i> , 313 U. S. 289-----	31
<i>Scott v. Norton Hardware Co.</i> , 54 F. 2d 1047 (C. A. 4)-----	12
<i>Security-First Nat. Bank of Los Angeles v. Chapman</i> , 41 Cal. App. 219, 106 P. 2d 431-----	28
<i>Shapiro v. United States</i> , 335 U. S. 1-----	19
<i>Shriver v. Woodbine Bank</i> , 285 U. S. 467-----	13
<i>Siebold, Ex Parte</i> , 100 U. S. 371-----	31
<i>South Amboy Trust Co. v. McMichael Holdings</i> , 141 N. J. Equity 12, 56 A. 2d 437-----	34
<i>Testa v. Katt</i> , 330 U. S. 386-----	31
<i>United States v. Allen-Bradley Co.</i> , 352 U. S. 306-----	19
<i>United States v. American Trucking Associations</i> , 310 U. S. 534--	11, 15
<i>United States v. Chamberlin</i> , 219 U. S. 250-----	13
<i>United States v. Citizens Loan Co.</i> , 316 U. S. 209-----	11, 15

Cases—Continued

Page

<i>United States v. Gallardo</i> , 154 F. Supp. 373 (N. D. Calif.)	25, 29
<i>United States v. Hansett</i> , 120 F. 2d 121 (C. A. 2)	13
<i>United States v. Henderson</i> , 121 F. Supp. 343 (S. D. Iowa)	25, 29, 30
<i>United States v. Henning</i> , 344 U. S. 66	11
<i>United States v. Jones</i> , 155 F. Supp. 52 (M. D. Ga.)	25, 29, 35
<i>United States v. Madigan</i> , 300 U. S. 500	15
<i>United States v. Plesha</i> , 352 U. S. 202	22, 23, 24
<i>United States v. Public Utilities Commission</i> , 345 U. S. 295	11
<i>United States v. Stevenson</i> , 215 U. S. 190	13
<i>United States v. Zazova</i> , 334 U. S. 602	11, 23
<i>United States v. Zucca</i> , 351 U. S. 91	11
<i>United States Fidelity & Guaranty Co. v. Centropolis Bank</i> , 17 F. 2d 913 (C. A. 8)	12
<i>W. H. Marston Co. v. Central Alaska Fisheries Co.</i> , 210 Cal. 715, 258 P. 933	12
<i>Wissner v. Wissner</i> , 338 U. S. 655	30, 31
<i>Woodlee v. Burch</i> , 43 Mo. 231	34

Constitution, Statutes and Regulations:

United States Constitution, Article 6, Clause 2	31
24 Am. Jur. Guaranty, § 123, p. 955	34
Servicemen's Readjustment Act of 1944, 58 Stat. 291, as amended 38 U. S. C. 693 <i>et seq.</i> :	
Section 500 (a)	5
Section 500 (b)	21
Section 501 (a) (2)	6, 14
Section 504	11, 16
Section 504 (a)	7, 11
Section 506	4, 7, 19, 21
Section 506 (a)	14, 20
Section 506 (b)	8, 14, 21, 22
Soldiers & Sailors Civil Relief Act of 1940:	
Article IV	23
59 Stat. 270	19
59 Stat. 542	19
59 Stat. 626	19, 21
62 Stat. 1209	19
62 Stat. 1275	19
64 Stat. 74	19
65 Stat. 316	19
65 Stat. 320	19
66 Stat. 64	19
66 Stat. 682	19
67 Stat. 135	19
68 Stat. 320	19
68 Stat. 643	19
68 Stat. 756	19
70 Stat. 913	22
28 U. S. C. 1291	1
28 U. S. C. 1345	1, 5

Constitution, Statutes, and Regulations—Continued

	Page
California Code of Civil Procedure: Section 580 (b)-----	5, 26, 27
Veterans Administration Regulation 36.4323 (1949 Ed.) :	
38 C. F. R. 36.4320 (b)-----	33
38 C. F. R. 36.4323-----	9
38 C. F. R. 36.4323 (a)-----	9
38 C. F. R. 36.4323 (b)-----	9
38 C. F. R. 36.4323 (c)-----	9
38 C. F. R. 36.4323 (d)-----	10
38 C. F. R. 36.4323 (e)-----	10, 11, 16
Veterans Administration Regulation (1944 Supp.) 38 C. F. R. 36.4043-----	16
Miscellaneous :	
Decisions of the Administrator of Veterans' Affairs, No. 625 (Jan. 22, 1945), Vol. 1 :	
pp. 1154-1164-----	16, 17
p. 1154-----	17
p. 1158-----	17
p. 1159-----	22
p. 1164-----	18
11 F. R. 2123-----	11, 23
Federal Rules of Civil Procedure, Rule 76-----	1
Hearings before House Committee on World War Veterans Legis- lation on H. R. 3749 and related bills, 79th Cong., 1st Sess.---	15
Hearings before House Committee on World War Veterans Legis- lation on H. R. 3917 and S. 1767, 78th Cong., 2d Sess.-----	15
Hearings before Senate Committee on Finance on H. R. 3749---	15
R. Rept. 1971, 84th Cong., 2d Sess., pp. 4, 7-----	20
38 Ops. Atty. Gen. 75-----	13
38 Ops. Atty. Gen. 319-----	13
S. Rep. 2489, 84th Cong., 2d Sess., pp. 4, 9-----	20
Simpson, <i>Suretyship</i> , p. 227-----	27, 28
Stearns, <i>Law of Suretyship</i> (5th ed.) :	
p. 518-----	12
p. 523-----	27, 28
Section 11.1-----	20, 27
Section 11.18-----	20, 27
Section 11.35-----	20, 27

In the United States Court of Appeals for the Ninth Circuit

No. 15858

ARTHUR EARL MCKNIGHT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLEE

STATEMENT

This action was brought by the United States to recover moneys paid out by it under its guaranty as a result of default by defendant McKnight on a G. I. home loan. McKnight had been the recipient of a loan guaranteed by the Government, pursuant to the Servicemen's Readjustment Act of 1944, as amended (*infra*). The district court held the Government entitled to recovery and entered judgment in its favor and against McKnight for \$1,453.64, plus interest. The district court's jurisdiction was based on 28 U. S. C. 1345, and this Court's jurisdiction rests on 28 U. S. C. 1291. The relevant facts as found by the court below,¹ may be summarized as follows (R. 9-14) :

¹ The present appeal is before this Court on an Agreed Statement (R. 3-8) pursuant to Rule 76, Federal Rules of Civil Procedure. The district court's findings have been accepted by both parties as the facts for this Court's consideration on appeal (R. 8).

On August 1, 1947, McKnight, a veteran of World War II, eligible for benefits under the Servicemen's Readjustment Act of 1944, obtained a home loan from the Porterville Mutual Building and Loan Association of Porterville, California, in the sum of \$6,750.00. In return he executed his promissory note in the Association's favor, whereby he promised to pay the principal sum plus interest at 4 percent per annum in installments. McKnight's obligation was secured by a deed of trust on the real property in question and was incurred for the purpose of his purchasing that property. On the same date the note was executed, McKnight signed Veterans Administration Form 4-1820 "Home Loan Report" and thereby applied to the Veterans Administrator for a guarantee of 50 percent of the loan under the provisions of the Servicemen's Readjustment Act of 1944, as amended. The Veterans Administrator approved the Home Loan Report and the application contained therein and on October 30, 1947, issued V. A. Form 4-1899, "Loan Guaranty Certificate," guaranteeing payment of 50 percent of the \$6,750.00 loan, or \$3,375.00.

On September 1, 1947, McKnight defaulted on payment of the note and loan to the Porterville Mutual Building and Loan Association, and remained in default at all times thereafter. The Association elected to declare the whole sum of the principal and interest due immediately. On November 26, 1947, it notified the Veterans Administrator by letter of McKnight's default and of its own election to foreclose on the loan and security. On December 4, 1947 the Veterans Administrator notified McKnight by registered mail that

any sums paid out by the Government in satisfaction of a claim under the guarantee on the loan would constitute a debt owing by McKnight to the United States Government.

Thereafter, on January 23, 1948, the Association filed a claim with the Veterans Administrator for payment of the loan guarantee—\$3,375.00. The Veterans Administrator subsequently paid this amount to the Association.

In the interim, on January 26, 1948, the Association published and recorded in the official records of Tulare County, California, its Notice of Default and Election to Sell the real property which secured, under Trust Deed, the McKnight loan. The Veterans Administrator authorized an appraisal for foreclosure purposes.² On April 16, 1948, an appraisal was made and reported on Veterans Administration Form 4-1803. The liquidation value of the subject property on that date was set at \$6,171.00.

Thereafter, on May 1, 1948, the Veterans Administration, in accordance with the applicable law and regulations, established the “upset price” to govern the trustee’s sale of the property. This “upset

² With reference to such appraisal the Veterans Administrator instructed the appraiser specifically as follows:

“Care should be exercised by the appraiser upon acceptance of the assignment to estimate a price which will produce a sale under present market conditions and at the same time protect the interests of the administration. Special attention should be given to items of repair to insure safeguarding the property as well as increasing saleability. The appraiser should alter his certificate to clearly show that the appraisal is made for liquidation purposes and is not to be construed as ‘reasonable value.’ ”

price'' was \$5,500.00. The Administrator then authorized the sale of the real property subject to the trust deed and subject to the said upset price of \$5,500, all in accordance with the applicable law and regulations. On May 27, 1948, at the trustee's sale, property was sold to the Porterville Mutual Building and Loan Association for the sum of \$5,500.00.

As of May 27, 1948 immediately prior to the trustee's sale, the balance due the Association from McKnight, after crediting to the account the \$3,375.00 paid by the Veterans Administrator, was the net sum of \$3,578.64. As of the same date, immediately after the trustee's sale, the sale price of \$5,500, was further credited to McKnight's account, thereby extinguishing McKnight's indebtedness to the Association and leaving an excess in the hands of the Association of \$1,921.36. The latter sum under the applicable law and regulations was to be held for the use and benefit of the Government. It was later credited by the Veterans Administrator against the sum of \$3,375.00 previously paid out by him.

The Veterans Administrator, the trial court found, thus suffered a loss in the payment of the claim upon the guarantee on McKnight's loan of \$3,375.00, which loss was reduced to \$1,453.64 after application of the \$1,921.36 credit. McKnight, the court stated, had refused to pay any part of the balance due the Government.

McKnight had contended in the court below, citing 38 U. S. C. 694 (g), *infra*, pp. 7-8, that the Government, in its efforts to recover on the guarantee was limited to whatever rights the Association had. He further

argued that the present action was one for a deficiency judgment and that since Section 580 (b) of the California Code of Civil Procedure bars deficiency judgments, the Association, and, therefore, the Government as well, would be precluded from recovery.

The district court however, reached the following legal conclusions (R. 14-16): The court had jurisdiction of the Government's claim under 28 U. S. C. 1345. This claim, in turn rested on lawful regulations issued pursuant to the Servicemen's Readjustment Act of 1944 as amended. These regulations (*infra*, pp. 9-10), which were in force at all material times, made McKnight liable to indemnify the Veterans Administrator for any loss resulting from the guarantee of McKnight's liability under the provisions of the 1944 Act. This loss the court fixed at \$1,453.64,³ and judgment for that sum plus interest and costs, amounting to \$2,027.57, was entered for the Government.

STATUTES AND REGULATIONS INVOLVED

The Servicemen's Readjustment Act of 1944, as amended, 38 U. S. C. 693 *et seq.*, provides in pertinent part as follows:

SEC. 500 (a), 38 U. S. C. 694 (a). General provisions governing loans—(a) Eligibility; amount of guaranty; computation.

³ The district court rejected as irrelevant defendant's offer to prove that the Administrator subsequently acquired the property in question from the Portersville Mutual Building and Loan Association in accordance with VA regulations at a total cost of \$7,047.50 and resold it for a gross price \$6,850—the net proceeds to the Administrator being \$6,631.88.

Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war, or at any time on or after June 27, 1950, and prior to such date as shall be determined by Presidential proclamation or concurrent resolution of the Congress, and who shall have been discharged or released therefrom under conditions other than dishonorable after active service of ninety days or more, or by reason of an injury or disability incurred in service in line of duty, shall be eligible for the benefits of this subchapter. Entitlement derived from service on or after June 27, 1950, shall (1) cancel any unused entitlement derived from service prior to June 27, 1950, and (2) be reduced by the amount entitlement from such prior service shall have been used to obtain a direct, guaranteed, or insured loan (a) on real property which the veteran owns at the time of application or (b) as to which the Administrator shall have incurred actual liability or loss, unless in the event of loss or the incurrence and payment of such liability by the Administrator, the resultant indebtedness of the veteran to the Government shall have been paid in full. * * *

SEC. 501 (a) (2), 38 U. S. C. 694a (a) (2).
Loans for homes; amount of guarantee.

(a) Any loan made to a veteran under this subchapter, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is automatically

guaranteed if made pursuant to the provisions of this subchapter, including the following

* * * * *

(2) That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses, and the veteran is a satisfactory credit risk; and that the nature and condition of the property is such as to be suitable for dwelling purposes * * *.

SEC. 504 (a), 38 U. S. C. 694d (a). Rules and regulations; delegation of authority; minimum construction requirements; appraisals.

(a) The Administrator is authorized to promulgate such rules and regulations not inconsistent with this subchapter, as are necessary and appropriate for carrying out the provisions of this subchapter, and may delegate to subordinate employees authority to issue certificates, or other evidence, of guaranty of loans guaranteed under the provisions of this subchapter, and to exercise other administrative functions under this subchapter.

SEC. 506, 38 U. S. C. 694g. Procedure on default; release from liability.

(a) In the event of default in the payment of any loan guaranteed under this subchapter, the holder of the obligation shall notify the Administrator who shall thereupon pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty: *Provided*, That prior to suit or foreclosure the holder of the

obligation shall notify the Administrator of the default, and within thirty days thereafter the Administrator may, at his option, pay the holder of the obligation the unpaid balance of the obligation plus accrued interest and receive an assignment of the loan and security: *Provided further*, That (1) nothing in this section shall be construed to preclude any forbearance for the benefit of the veteran as may be agreed upon by the parties to the loan and approved by the Administrator; and (2) the Administrator may establish the date, not later than the date of judgment and decree of foreclosure or sale, upon which accrual of interest or charges shall cease.

(b) Whenever any veteran disposes of residential property securing a guaranteed, insured, or direct loan obtained by him under this subchapter, the Administrator, upon application made by such veteran and by the transferee incident to such disposal, shall issue to such veteran in connection with such disposal a release relieving him of all further liability to the Administrator on account of such loan (including liability for any loss resulting from any default of the transferee or any subsequent purchaser of such property) if the Administrator has determined, after such investigation as he may deem appropriate, that (1) the loan is current, and (2) the purchaser of such property from such veteran (a) has obligated himself by contract to purchase such property and to assume full liability for the repayment of the balance of the loan remaining unpaid, and has assumed by contract all of the obligations of the veteran under the terms of the instruments creating and securing the loan, and (b) qualifies from a credit standpoint, to the same extent as if he were a

veteran eligible under section 501 (a), for a guaranteed or insured or direct loan in an amount equal to the unpaid balance of the obligation for which he has assumed liability.

Veterans Administration Regulation 36.4323, 38 C. F. R. (1949 ed.) 36.4323, provides as follows:

Subrogation and indemnity.—(a) The Administrator shall be subrogated to the contract and the lien or other rights of the holder to the extent of any sum paid on a guaranty or on account of an insured loss, which right shall be junior to the holder's rights as against the debtor or the encumbered property until the holder shall have received the full amount payable under his contract with the debtor. No partial or complete release by a creditor shall impair the rights of the Administrator with respect to the debtor's obligation.

(b) The holder, upon request, shall execute, acknowledge and deliver an appropriate instrument tendered him for that purpose, evidencing any payment received from the Administrator and the Administrator's resulting right of subrogation.

(c) The Administrator shall cause the instrument required by paragraph (b) of this section to be filed for record in the office of the recorder of deeds, or other appropriate office of the proper county, town or State, in accordance with the applicable State law. The filing or failure to file such instrument for record shall have the legal results prescribed by the applicable law of the State where the real or personal property is situated, with re-

spect to filing or failure to so file mortgages and other lien instruments and assignments thereof.

The references herein to "filing for record" include "registration" or any similar transaction, by whatever name designated when title to the encumbered property has been "registered" pursuant to a Torrens or other similar title registration system provided by law.

(d) As a condition to paying a claim for an insured loss the Administrator may require that the loan, including any security or judgment held therefor, be assigned to the extent of such payment, and if any claim has been filed in bankruptcy, insolvency, probate, or similar proceedings such claim may likewise be required to be so assigned.

(e) Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran.

ARGUMENT

I. The United States is entitled to indemnity from the defendant for the loss which it suffered as a guarantor of his loan

A. Defendant is bound by a valid regulation to indemnify the United States for its loss

In establishing the Veterans Administration's program of home loan guarantees for veterans, the Servicemen's Readjustment Act of 1944, 38 U. S. C. 693, *et seq.*, expressly authorizes the Administrator of Veterans Affairs to promulgate such rules and regulations as are necessary and appropriate to carry out

the provisions of the Act. 38 U. S. C. 694d. Pursuant to this statutory authority, the Administrator has provided by regulation that "[a]ny amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran." 38 C. F. R. (1949 ed.) 36.4323 (e). This regulation was published in the Federal Register on March 1, 1946 (11 F. R. 2123); it was incorporated by reference into defendant's application for a loan guarantee, and unless inconsistent with the statute, was binding upon him. *Federal Crop Ins. Co. v. Merrill*, 332 U. S. 380; *United States v. Zazove*, 334 U. S. 602.

1. *The regulation requiring indemnity is valid.* It is, of course, well settled that a regulation promulgated by an agency charged with the duty of administering a statutory program is entitled to great weight, and can be overturned only if it is clearly inconsistent with the statutory intent. *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315; *United States v. American Trucking Associations*, 310 U. S. 534, 549; *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 275; *United States v. Citizens Loan & Trust Co.*, 316 U. S. 209; *Colgate Co. v. United States*, 320 U. S. 422, 426; *Billings v. Truesdell*, 321 U. S. 542, 552-553; *Roland Co. v. Walling*, 326 U. S. 657, 677; *United States v. Henning*, 344 U. S. 66, 77; *United States v. Public Utilities Commission*, 345 U. S. 295, 314-315; *United States v. Zucca*, 351 U. S. 91, 96. As we shall show, the Veterans Administration regulation requiring veterans to indemnify the

United States for losses sustained on home loan guarantees is not only clearly consistent with the intent of Congress, but in fact is required by the statute. Both the language and the purpose of the Servicemen's Readjustment Act clearly demonstrate that Congress had no intention of making the loan guarantee program a "give-away" plan, by which the Government was to be the loser every time there was a default by the veteran and a depreciation in the value of the house. To the contrary, the statute itself, its legislative history, and its consistent administrative interpretation leave no doubt but that Congress contemplated repayment by the veteran of any losses incurred by the Government in its role as a guarantor.

a. In the first place the act carefully and specifically creates a relationship of "guaranty," using that term over and over again, in almost every section and subsection of the statute. The concept of "guaranty" has a definite and well known legal significance in our law; in every guaranty relationship, "there is an implied promise that the principal debtor will reimburse a guarantor or a surety who has paid the debt to the creditor, and such guarantor or surety has a right of action against the principal for reimbursement". *Joe Balestrieri & Co. v. Comm'r.*, 177 F. 2d 867, 872 (C. A. 9). See, *e. g.*, *Stearns, Law of Suretyship* (5th ed.), p. 518; *United States Fidelity & Guaranty Co. v. Centropolis Bank*, 17 F. 2d 913 (C. A. 8); *Scott v. Norton Hardware Co.*, 54 F. 2d 1047 (C. A. 4); *W. H. Marston Co. v. Central Alaska Fisheries Co.*, 210 Cal. 715, 258 P. 933. Congress, of course, is

presumed to use established legal terms with their recognized meaning; *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, 115; *McNally v. Hill*, 293 U. S. 131, 136; and when a statute utilizes a transaction familiar to the law, Congress normally means to ascribe to that transaction the same legal consequences that generally flow from it. See, *e. g.*, guaranty—38 Ops. Atty. Gen. 75, 38 *id.* 319; insurance contract—*Ferguson v. Union National Bank*, 126 F. 2d 753, 759 (C. A. 4); *Fleetwood Acres v. Federal Housing Administration*, 171 F. 2d 440, 442 (C. A. 2); note—*United States v. Hansett*, 120 F. 2d 121, 122 (C. A. 2); mortgage—*Home Owners Loan Corporation v. Wilkes*, 130 Fla. 492, 178 So. 161.⁴

In the present case, however, it is unnecessary to rely only on the normal meaning of the term “guaranty” to determine defendant’s liability for indemnity; for other provisions in the statute itself make it clear that Congress intended the United States to be indemnified for any losses suffered in the course of its home loan guaranty program. Thus, the Act not only limits home loan guarantees to veterans who

⁴ A corollary rule of like import also sustains the Government’s right to indemnity. This is the settled principle that an established common law remedy is not taken away by a statute except by express enactment or necessary implication. *Shriver v. Woodbine Bank*, 285 U. S. 467, 478–9; *United States v. Chamberlin*, 219 U. S. 250; *United States v. Stevenson*, 215 U. S. 190, 197–199; *King v. Pomeroy*, 121 Fed. 287, 290–293 (C. A. 8); and see *Perego v. Dodge*, 163 U. S. 160, 167–8. Certainly there is no express waiver of the right to indemnity in the Act; to the contrary, as we shall show, both the statutory language and its consistent administrative interpretation make clear that the Government in fact does have this right.

are "satisfactory credit risks,"⁵ but in fact refers to "the resultant indebtedness of the veteran to the Government" in the event the Administrator incurs actual loss or liability on a guaranteed or insured loan 38 U. S. C. 694 (a). Section 506 (a), 38 U. S. C. 694g, 'dealing with the procedure on default, states that the Administrator "shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty * * *." And Section 506 (b), relating to release from liability, makes clear that a veteran is personally liable to the Administrator for any loan arising out of a home loan guaranty, by providing that on transfer of the mortgaged property the veteran can be relieved of such liability—"including liability for any loss resulting from any default of the transferee * * *"—only if the new purchaser of the property "has obligated himself by contract * * * to assume full liability for the repayment of the balance of the loan * * *." 38 U. S. C. 694g (b).

b. The duty of indemnity which is so plainly implied by the language of the statute is reinforced by the consistent administrative construction of the Act to include a right of the Government to indemnity. In accordance with the general principle of deference to

⁵ Section 501 (a) (2) of the Act, 38 U. S. C. 694a (a) (2) states that home loans will be guaranteed only if it is shown, *inter alia*:

"That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or construction cost bear a proper relation to the veteran's present and anticipated income and expenses, and the veteran is a satisfactory credit risk * * *."

administrative construction, discussed *supra*, p. 11, the Supreme Court has often recognized the great weight to be given consistent administrative interpretation of veterans legislation by the Veterans Administration. *United States v. Citizens Loan & Trust Co.*, 316 U. S. 209, 214; *United States v. Madigan*, 300 U. S. 500, 505. This rule, of course, has special applicability where, “* * * it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new,” *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315, and particularly where, as here, the agency participated in drafting the measure.⁶ *United States v. American Trucking Associations, Inc.*, 310 U. S. 534, 549.

Moreover, even apart from their importance as a guide to Congressional intent, agency regulations of the type here involved have an independent significance as authoritative statements of the “terms and conditions” upon which Governmental benefits such as insurance or guarantees may be had. As the Supreme Court stated in *Federal Crop Ins. Corp. v. Merrill*, 332 U. S. 380, 384:

⁶ The Veterans Administration participated actively in drafting all of the provisions of the Servicemen’s Readjustment Act of 1944, including the home loan guarantee provisions and amendments thereto. See *e. g.*, Hearings before House Committee on World War Veterans Legislation on H. R. 3917 and S. 1767, 78th Cong., 2d Sess.; Hearings before Senate Committee on Finance on H. R. 3749 and Hearings before House Committee on World War Veterans Legislation on H. R. 3749 and related bills, 79th Cong., 1st Sess.

Inevitably "the terms and conditions" upon which valid governmental insurance can be had must be defined by the agency acting for the Government. And so Congress has legislated in this instance, as in modern regulatory enactments it so often does, by conferring the rule-making power upon the agency created for carrying out its policy.

In the present case, the Administrator, pursuant to the authority vested in him under 38 U. S. C. 694d, proceeded almost immediately after the enactment of the Servicemen's Readjustment Act of 1944, to define the terms and conditions under which the Government would guarantee veterans' home loans. On October 18, 1944, he promulgated regulations relating to home loan guarantees, and providing, *inter alia*, that "[a]ny amounts paid to the creditor by the Administrator pursuant to the guaranty shall constitute a debt due to the United States by the veteran on whose application the guaranty was made * * *." 38 C. F. R., 1944 Supp., 36.4043. This has consistently remained the position of the Veterans Administration and is incorporated in substantially the same language in the present regulation, 38 C. F. R., 1949 ed., 36.4323 (e), set out *supra*, p. 10.

Moreover, in addition to setting forth his construction of the statute in the regulations, the Administrator as early as 1945 had specifically considered the question of the Government's right to indemnity in the precise circumstances presented here, and published a formal decision on the matter. Decisions of the Administrator of Veterans' Affairs, No. 625 (Jan-

uary 22, 1945), Vol. 1, pp. 1154–1164. In this Decision, the Administrator had to determine whether the Veterans Administration would refuse to guarantee real estate mortgage loans in states such as North Dakota, and California because those states had statutes prohibiting mortgagees from obtaining deficiency judgments. The Administrator considered this question from two aspects: (1) whether under the terms of the Servicemen's Readjustment Act he was authorized to approve an application for guarantee notwithstanding that the mortgagee would be barred from proceeding against the mortgagor for a deficiency judgment in the event of default, and (2) if the Administrator was authorized to guarantee such a loan, what effect would a state deficiency judgment have "on the right of the United States as guarantor to collect from the veteran, by virtue of the right to indemnity that normally exists in favor of a guarantor?" (p. 1154).

The Administrator found first, after a discussion of North Dakota and California law, that while his right as a *subrogee* was restricted by such deficiency judgment provisions, "* * * this does not mean that the United States is not entitled to recover on other legal basis" (p. 1158). Moreover, he pointed out, Congress in legislating for veterans all over the country "intended that so far as possible the benefits of the act should be available irrespective of the particular jurisdiction in which the veteran or the property might be situated" (*ibid.*), and that if it was possible the statute should be construed to accomplish

that result. Accordingly, he held that the Veterans Administration should approve an otherwise suitable loan guaranty application notwithstanding provisions of state law barring deficiency judgments.

Turning to the second aspect of the question, the Administrator noted that although these state law provisions barred the mortgagee from obtaining a deficiency judgment against his mortgagor, they would neither bar the mortgagee from pressing his claim for a deficiency against the United States as guarantor, nor bar the guarantor from then obtaining indemnity from the mortgagor.⁷ Moreover, he pointed out, the express contract of indemnity between the veteran and the United States, created by the regulation and the veteran's application for the loan, would be valid under federal law regardless of state law prohibitions. The Administrator therefore concluded that notwithstanding such deficiency judgment statutes, "the United States will be entitled to recover from the veteran indemnification for such amounts as the United States may pay" if the veteran defaults (p. 1164).

These contemporaneous administrative determinations of the Government's right to indemnity, as published in the regulations and in the Administrator's Decision just discussed, are of course presumed to have been known to Congress, *National Lead Company v. United States*, 252 U. S. 140. The legislature's failure, despite repeated amendments of the

⁷ That the law of California is to this effect, see *infra*, pp. 27-28.

statute,⁸ to modify the regulation requires the conclusion that the regulation is consistent with the intent of Congress. *United States v. Allen-Bradley Co.*, 352 U. S. 306, 308-311; *Corn Products Co. v. Commissioner*, 350 U. S. 46, 53; *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 544-549; *Shapiro v. United States*, 335 U. S. 1, 6; *Commissioner v. Flowers*, 326 U. S. 465, 469; *Helvering v. Winmill*, 305 U. S. 79; *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 310-315; *Hecht v. Malley*, 265 U. S. 144, 153; see also *Brooks v. Dewar*, 313 U. S. 354, 361; *Fleming v. Mohawk Co.*, 331 U. S. 111, 118-119; *Mitchell v. Covington Mills*, 229 F. 2d 506, 509 (C. A. D. C.), certiorari denied, 350 U. S. 1002.

Nor is Congressional knowledge of the regulation requiring indemnity, and of the consistent administrative practice enforcing this regulation, based only upon a presumption. For these matters were expressly called to the attention of the appropriate committees of both the House and Senate, while Congress was engaged in amending Section 506, the very Section of the statute providing for procedure on default. In the course of considering the legislation which added to that Section the provisions of present subsection (b) (dealing with release from liability), the Chairmen of both the House Committee on Veterans' Affairs and the Senate Committee on Labor and Public Welfare were advised by the Administra-

⁸ In the first ten years of its existence, the VA guarantee program was amended at least fourteen times. See 59 Stat. 270; 59 Stat. 542; 59 Stat. 626; 62 Stat. 1209; 62 Stat. 1275; 64 Stat. 74; 65 Stat. 316; 65 Stat. 320; 66 Stat. 64; 66 Stat. 682; 67 Stat. 135; 68 Stat. 320; 68 Stat. 643; 68 Stat. 756.

tor of Veterans' Affairs of the consistent administrative practice, pursuant to regulation, of pressing personal claims for indemnification against all veterans who defaulted on their loans and relinquished property which was not sufficient to satisfy the mortgage debt. H. Rept. 1971, 84th Cong., 2d Sess., pp. 4, 7; S. Rep. 2489, 84th Cong., 2d Sess., pp. 4, 9. Moreover, the Senate Report expressly recognizes (p. 4) that "[i]f the second purchaser defaults and there is a deficiency claim as a result thereof, the original veteran purchaser is liable for such deficiency under the present laws." And, as we have shown above (*supra*, p. 14), this new provision was expressly intended to create a method of relieving the veteran of this liability if he sold the house.⁹

c. We believe that the foregoing discussion clearly demonstrates that the United States is entitled to be indemnified by veterans for losses sustained under the loan guarantee program. Defendant, however, relies heavily upon the fact that Section 506 (a) specifically mentions only the Government's right to subrogation, and argues that the United States is therefore confined to this remedy in the event of default. But subrogation is only one of the "three great equitable rights" of a guarantor, Stearns, *The Law of Suretyship* (5th ed.) §§ 11.1, 11.18, 11.35; the

⁹ As noted above, *supra*, p. 14, the language of this subsection refers expressly to the veteran's "liability for any loss resulting from any default," and otherwise clearly demonstrates that its purpose is to permit a veteran who sells a mortgaged house to be relieved of his *personal* liability for the mortgage debt only if he arranges for his transferee to assume this debt.

others being indemnity and contribution. These remedies are cumulative, not exclusive and all normally flow from the guaranty relationship. As we have pointed out (*supra*, pp. 12-13), Congress, in expressly creating such a relationship, must be presumed to have included all of the rights and obligations which normally attach thereto. Indeed, we have shown that both the statutory language and the consistent administrative construction of the Act conclusively demonstrate the Congressional intent to impose a personal liability for reimbursement. Accordingly, there plainly was no impropriety in the Administrator's spelling out his right to indemnity in addition to that of subrogation.

Moreover, the legislative history of this language makes perfectly clear that the use of the word subrogation in Section 506 (~~(d)~~) is in reference only to the Government's right to *security*, and in no way limits its right to *reimbursement*. Section 500 (b) of the 1944 Act, 58 Stat. 291, originally provided that "* * * No security for the guaranty of a loan shall be required except the right to be subrogated to the lien rights of the holder of the obligation which is guaranteed * * *". When the statute was revised in 1946, this language was abbreviated and moved into the new Section 506, entitled "Procedure on Default," 59 Stat. 626 *et seq.* There is no evidence whatever that this change was intended to limit the Government's right to reimbursement, whether by subrogation or indemnity; to the contrary, the outstanding regulation and

the Administrator's Decision, discussed *supra*, pp. 16-18, require the opposite conclusion.¹⁰

And, finally, whatever doubt may still have existed of the Government's right to indemnity was conclusively dispelled in 1956 by the addition to Section 506 of subsection (b), providing for release from liability, 70 Stat. 913. As we have already shown, this subsection was enacted into law after specific advice to both Houses of Congress from the Administrator of Veteran's Affairs of the Agency's consistent practice of requiring indemnity from defaulting veterans. Although Congress was amending the very Section of the Act upon which appellant relies, it took no action whatever to change the statute so as to nullify or alter the administrative practice. Instead, as we have shown, the language of Section 506 (b) expressly takes this obligation into account by referring to the borrower's "liability for any loss" and "full liability for the repayment of the balance of the loan." In these circumstances, it is perfectly clear that the Veterans Administration regulation requiring a veteran to indemnify it for the losses which it suffered in guaranteeing his home loan is valid.¹¹

¹⁰ Thus, as the Administrator stated in 1945 in Decision No. 625, *supra*, at p. 1159, the provision regarding subrogation deals "with the question of what property rights are acquired by the veteran, not what liability he assumes personally. From the Government's *security* standpoint the statute deals with the question of what liens on the property the Government acquires * * *. The Government's chief *protection* consists of its rights to be 'subrogated to the lien rights.'" (Emphasis added.)

¹¹ The foregoing discussion clearly demonstrates the distinction between the situation here and that involved in *United States*

2. *The regulation is binding upon defendant.* As we have just shown (*supra*, pp. 11-22), defendant's obligation to indemnify the United States for the loss incurred in guaranteeing his home loan is fixed by a valid regulation. This regulation was published in the Federal Register (11 F. R. 2123, March 1, 1946) and was "binding on all who sought to come within the [guarantee program]." *Federal Crop Ins. Co. v. Merrill*, 332 U. S. 380, 385; see also *United States v.*

v. Plesha, 352 U. S. 202. The *Plesha* case involved the provision of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 under which men inducted into the Armed Forces would continue to receive the protection of previously purchased commercial life insurance while in the service without paying premiums. The Government had assured the insurance companies that the premiums on the policies would be paid by giving its promissory certificates to the companies. The question presented in *Plesha* was whether in so doing, the United States had created the relationship of guarantor between itself and the servicemen, so that in the event that the latter failed to pay back premiums on their commercial insurance after they were discharged from the service, the United States would be entitled to reimbursement from these servicemen for any losses which it suffered on its promissory certificates. The Supreme Court held that "the language of the 1940 Act, its legislative history and its administrative interpretation" demonstrated that the veterans were not so liable. As we have shown, however, all three of these considerations—the language, legislative history, and administrative interpretation of the Servicemen's Readjustment Act—in the present case clearly establish the liability of a veteran to indemnify the United States for a loss sustained in guaranteeing a home loan.

Thus, the fundamental issue in *Plesha* was whether the statute in fact created a guaranty relationship, and reasoning that it did not, the Court denied the Government's right to indemnity (352 U. S. at 211). Here, however, the statute *expressly* creates a guaranty relationship, and the only issue is whether in providing for such a relationship, Congress intended it to include its normal common law implications. As

Zazove, 334 U. S. 602. As the Supreme Court stated in the *Merrill* case, 332 U. S. at 384-5, "[j]ust as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."

Moreover, the regulation requiring indemnity was we have shown above, Congress clearly so intended. Further, in striking contrast to the situation here, the legislative history in *Plesha* demonstrated that initially Congress expected to sustain losses as a result of its program (352 U. S. at 206-207); and the Court found that in subsequently amending the statute to require reimbursement, "Congress thought it was changing the law by changing the language of the Act" (352 U. S. 208). Here, on the other hand, not only did Congress from the very first clearly indicate its intention that the United States be repaid for any losses suffered under the loan guarantee program, but, with specific knowledge of the regulation requiring indemnity proceeded to amend the very Section here involved without making any pertinent change in such liability. Finally, and equally important, is the fact that, unlike the situation in *Plesha*, the consistent interpretation of the Act by the Agency administering it fully supports the Government's right to indemnity. In *Plesha*, the administrative agency generally ignored, and at times even *expressly disclaimed*, the liability of the serviceman to reimburse the United States. See 352 U. S. 208-210. In the instant case, however, the Veterans Administration, both by regulation and by a formal Decision of the Administrator, immediately took the position that the Government was entitled to indemnity. This position was incorporated by reference in the contracts signed by the veterans in obtaining loan guarantees and was enforced throughout the administration of the home loan program.

In short, the statute here involves an entirely different type of statutory benefit from that in *Plesha*, phrased in entirely different terms; and, unlike the situation in *Plesha*, here both the Congress and the Agency administering the benefit have clearly provided for and recognized the liability of the veteran to reimburse the United States for its losses.

incorporated by reference into the Home Loan Report itself, which was the formal application and document signed by the veteran in order to obtain the loan guarantee. The Report expressly provided that “[r]egulations issued under the Act, and in effect on the date of any loan which is submitted or approved for guarantee or insurance thereunder shall govern the rights, duties, and liabilities of the parties as to such loan * * *.” The present regulation requiring indemnity was published in 1946, and was in full force and effect in August, 1947, when defendant signed the application for his loan guarantee. Accordingly, it clearly was a binding condition of the guarantee. *Federal Crop Ins. Co. v. Merrill, supra*, 322 U. S. at 385.

In light of the persuasiveness of the foregoing considerations, it is not surprising that every court which has considered the problem has ruled that the United States is entitled to full indemnity under the Act and regulation. Thus, the three federal courts which have published decisions upon this question, as well as the court below, have unanimously agreed that the regulation places a veteran under an independent and enforceable obligation to indemnify the United States for any losses incurred as the result of a loan guarantee under the statute. *United States v. Gallardo*, 154 F. Supp. 373 (N. D. Calif.) ; *United States v. Jones*, 155 F. Supp. 52 (M. D. Ga.) ; *United States v. Henderson*, 121 F. Supp. 343 (S. D. Iowa). As stated in the *Henderson* decision (121 F. Supp. at 344) :

The language of this provision [38 C. F. R. 36.323 (e), *supra*] is clear and there can be no question therefrom of the intent of the Cong-

ress to make any payments made by the Government under the guarantee of the Act an enforceable demand until full satisfaction is obtained. * * * Defendant's liability, created when his loan application was made out and the note and mortgage executed, remains a direct and subsisting obligation until the Government has been repaid.

We submit that the court below properly held that defendant, too, is under a valid and subsisting obligation to indemnify the United States for the loss which it sustained by reason of his default on a guaranteed home loan.

B. The Government's right to indemnity from the defendant is in no way impaired by provisions of California law barring deficiency judgments

As we have shown (Point IA, *supra*, pp. 10-26), defendant has an express duty to indemnify the United States for losses which it suffered in guaranteeing his home loan. Defendant, however, attempts to avoid his clear liability by arguing that the Government's right to recover is barred under Section 580 (b) of the California Code of Civil Procedure prohibiting deficiency judgments arising from sales of real property. We submit that this contention is totally without merit. In the first place, the Government's suit is not for a deficiency judgment, but for recovery under an independent contract of indemnity; and secondly, since the Government's claim is based directly upon a Federal statute and regulation, its right of recovery cannot in any event be impaired by operation of state law.

1. *The Government is suing upon an independent contract of indemnity, and not for a deficiency judg-*

ment. Section 580 (b) of the California Code of Civil Procedure, in forbidding deficiency judgments on the foreclosure of real estate mortgages, has no application to a suit against the mortgagor on an independent contract of indemnity. As we have shown in Point IA (*supra*, pp. 10-26), the Government's right to be indemnified by defendant arises from an express statutory and contractual obligation on the part of the latter to indemnify the Government for its loss. Such an action for indemnity, unlike a suit to enforce a right of subrogation, is in no way impaired by personal defenses which the defendant might have to a suit by his creditor. Stearns, *The Law of Suretyship* (5th ed.), p. 523; Simpson, *Suretyship*, p. 227.¹² Accordingly, the Government's right to recovery here is not affected by statutory restrictions on deficiency judgments, which the California courts have expressly held to apply only to claims by the creditor himself against the principal on the original obligation, and have "no application to an action based upon the independent obligation of a guarantor." *Bank of America Nat. Trust & Savings Assn. v. Hunter*, 8 Cal. 2d 592, 67 P. 2d 99. See also *Everts v. Matteson*,

¹² The surety's right of *subrogation*, where he obtains all of the rights of the creditor but is subject to all of the defenses which the principal might have against the creditor, is, of course, to be carefully distinguished from his right of *indemnity*, which arises out of an independent contract between the principal and surety, and thus does not depend on the rights *inter se* between the principal and creditor. See, *e. g.*, the discussion in Stearns, *supra*, §§ 11.1, 11.18, 11.35 distinguishing between the rights of subrogation, contribution and indemnity.

132 P. 2d 476; *Security-First Nat. Bank of Los Angeles v. Chapman*, 41 Cal. App. 219, 106 P. 2d 431, 432.

Nor is the Government's right to full reimbursement impaired by the fact that it paid a debt for which the defendant may not have been liable. It is well settled that a guarantor retains his right to reimbursement even though he pays a debt upon which the principal himself would not have been liable to the creditor, so long as the non-liability of the principal arises from causes which do not afford a defense to the guarantor. Stearns, *supra*, p. 523; Simpson, *supra*, § 48. In the instant case, it is plain that, although the bank might have been barred from obtaining a deficiency judgment against the defendant, it was in no way prohibited from holding the Government to its guarantee to pay this money. The California courts have made clear that the statutory provisions restricting deficiency judgments refer only to money judgments obtained by the creditor directly against the principal and do not foreclose the creditor from proceeding against any other security which he may hold from his principal, including an independent contract by a third party guaranteeing the debt. *Hatch v. Security-First Nat. Bank*, 19 Cal. 2d 254, 120 P. 2d 869; *Mortgage Guarantee Co. v. Sampsell*, 51 Cal. App. 2d 180, 124 P. 2d 353; *Security-First Nat. Bank of Los Angeles v. Chapman*, 41 Cal. App. 219, 106 P. 2d 431; *Bank of America Nat. Trust & Savings Assn. v. Hunter*, 8 Cal. 2d 542, 67 P. 2d 99; cf. *Loeb v. Christie*, 6 Cal. 2d 416, 420, 57 P. 2d 1303. Accordingly, since the Administrator was required as guarantor to pay the balance due on defendant's in-

debtedness, he is entitled to full reimbursement from the defendant.

The three Federal court decisions cited above, *supra*, p. 25, have expressly recognized the independent and subsisting liability of veterans to indemnify the United States for any losses incurred in guaranteeing home loans, regardless of the exhaustion of the original security or of state laws preventing deficiency judgments. In *United States v. Henderson*, 121 F. Supp. 343 (S. D. Iowa), the defendant argued that the Government's claim for indemnity could not be sustained because the original obligation had been retired by virtue of a state court judgment obtained by the creditor, and, under Iowa law, could no longer be enforced against him. The district court held, however, that under the regulation requiring indemnity (38 C. F. R. 36.4323), any payments made by the Government under its guaranty constituted "an enforceable demand until full satisfaction is obtained," 121 F. Supp. at 344. The court continued (*ibid.*): "Foreclosure proceedings could only extinguish the debt (as the entire loan could be a potential debt under the regulation), for that amount credited on the loan as a result of such action." This language was expressly adopted in *United States v. Jones*, 155 F. Supp. 52 (M. D. Ga.), where the court likewise recognized the right of the United States to recover under its contract of indemnity notwithstanding provisions of Georgia law barring deficiency judgments. And in *United States v. Gallardo*, 154 F. Supp. 373 (N. D. Cal.), District Judge Murphy

also "heartily endorse[d]" the reasoning of the *Henderson* decision in holding that "the principal creditor's settlement of the State court action did not extinguish defendant's debt to the United States which was created when the United States made payment to the principal creditor pursuant to its guarantee," 154 F. Supp. at 374. This language is squarely applicable here and, we submit, conclusively demonstrates that the right to indemnity is not affected by the state deficiency judgment statute.

2. *In any event, the Administrator's right to indemnity arises under federal law, and cannot be impaired by a state statute.* We have just shown (*supra*, pp. 26-30) that there is no conflict between the right of the Administrator to indemnity from the defendant and the California statute barring deficiency judgments. But even if the state law is interpreted to apply to indemnity contracts, it plainly cannot bar recovery here by the Administrator. As we have shown (*supra*, pp. 10-26), the Government's claim is predicated upon an independent right of indemnity, which by valid regulation constitutes one of the terms and conditions under which the federal government insured defendant's loan. Since this unconditional right of indemnity exists as part of a contract with the federal government, it is governed solely by federal law; "[t]he validity and construction of [Government contracts] present questions of federal law." *Pack v. United States*, 176 F. 2d 770, 771, (C. A. 9). See, *e. g.*, *Wissner v. Wissner*, 338 U. S. 655; *Clearfield Trust Co. v. United States*, 318

U. S. 363; *Royal Indemnity Co. v. United States*, 313 U. S. 289.¹³

The *Wissner* decision is, we submit, squarely in point. The Supreme Court there held that the proceeds of a National Service Life Insurance policy were to be distributed according to the terms of the policy itself without regard to the conflicting provision of California community property laws. To interpret the policy in terms of state law, said the Court, would frustrate "the deliberate purpose of Congress," 338 U. S. at 659.

Here, too, the Government's right of indemnity, as a valid part of the statutory and regulatory scheme governing the rights and duties of the parties under a contract to guarantee a federal home loan can in no way be diminished or destroyed by provisions of state law. In the event of a conflict between the regulation providing for indemnity and provisions of California law restricting that right, the Supremacy

¹³ There is no need to dwell on the proposition that powers of the federal government are supreme over any conflicting state laws. Article 6, Clause 2, of the Constitution. See *e. g.*, *Testa v. Katt*, 330 U. S. 386; *Ex Parte Siebold*, 100 U. S. 371, 392; *Clafin v. Houseman*, 93 U. S. 130. The manifest purpose of the Supremacy Clause is to remove all state obstacles to the performance by the federal government of any of its functions and so modifies "every power vested in subordinate governments, as to exempt its own operations from their influence." *McCulloch v. Maryland*, 4 Wheat. 316, 427. This freedom from conflicting state regulation is, of course, co-extensive with the scope of federal power, since every authorized activity of the United States is an exercise of its governmental power. *Graves v. N. Y. ex rel. O'Keeffe*, 306 U. S. 466, 477; *Pittman v. Home Owners' Corp.*, 308 U. S. 21, 32; *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, 102.

Clause of the Constitution and the cases cited above make clear that the federal regulations must govern.

II. The District Court properly computed the amount of the loss suffered by the United States

Appellant contends (Br., pp. 5-7) that in computing the amount of the loss suffered by the United States the court below erred in refusing to admit evidence relating to the acquisition and subsequent resale of the house by the VA. Defendant contends that in the course of these transactions, which took place after the trustee's sale and after payment of the guarantee by the Administrator, the VA substantially reduced its loss, and that its recovery from the defendant should be diminished accordingly. We submit that under settled principles of mortgage and indemnity law, the Government's loss for purposes of indemnity was fixed at the time of the trustee's sale, and the subsequent events to which defendant refers could operate neither to increase nor decrease the extent of his obligation to indemnify his guarantor.

1. *The transactions involved.* As we have shown in the Statement of the Case, *supra*, pp. 3-4, the lender bid at the trustee's sale the sum of \$5,500.00, which the VA had established to be the "upset" price of the house. This amount was credited to defendant's debt; in addition, the VA had paid the lender the full amount of its guarantee, \$3,375.00. Thus, at the moment after the trustee's sale, the lender has in its possession a house, the value of which has been fixed at \$5,500.00, plus \$3,375.00 which the VA had paid on its guarantee. Since the lender was entitled only to

\$6,953.64 to make itself whole, the balance of \$1,921.36 (\$8,875.00 less \$6,953.64) was credited to the VA against the \$3,375.00 it had paid. This left the VA with an "out-of-pocket" loss as fixed at the time of the trustee's sale, of \$1,453.64 (\$3,375.00 less \$1,921.36), and it was this amount which the court below awarded to the United States, together with interest and costs.

Defendant argues, however, that in computing the Government's loss, the following additional facts must be considered: The lender, instead of exercising its option of retaining the house and remitting to VA the unused portion of the \$3,375.00, chose to tender the house itself to VA, which the VA was obliged to accept at the established upset price of \$5,500 (38 C. F. R. 36.4320 (b)). Since the lender already had in its possession the \$1,921.36 which was to be credited to VA as the balance of its payment of \$3,375.00, VA then made payment to the holder of the balance of the \$5,500.00 (together with certain further incidental costs). Defendant, pointing out that the VA thus acquired the house for a total cost of \$7,047.50, wished to prove further that VA sold the house for a net price of \$6,631.88, thereby suffering a loss on the whole transaction of only \$415.62, instead of \$1,453.64 as found by the district court. The district court rejected defendant's offer to prove these additional facts, as not material to a determination of his liability of indemnity. As we shall show, the extent of defendant's liability both to the mortgagee and to the guarantor was fixed as a matter of law at the time of the trustee's sale, and accordingly,

the district court properly excluded this evidence of subsequent events.

2. *The applicable law.* It is a settled principle of mortgage law that the value of the mortgagor's equity in the mortgaged property is fixed by the amount bid at the foreclosure sale, and accordingly that, in the absence of fraud, a mortgagor has no right to compel a mortgagee to account to him for any profit made upon a subsequent resale of the premises. *General Auto Truck Co. v. Rust*, 88 F. 2d 774 (C. A. D. C.); *Ramsden v. Keene Five Cents Savings Bank*, 198 Fed. 807 (C. A. 8), certiorari denied, 196 U. S. 638; *Mangano v. Guaranty Building & Loan Assoc.*, 4 Cal. App. 2d 608, 42 P. 2d 329; *Pennsylvania Ave. Fed. Sav. & Loan Assoc. v. Fedder*, 175 Md. 127, 199 A. 785; *Gehlert v. Smiley*, 114 S. W. 2d 1029 (Mo.); *Woodlee v. Burch*, 43 Mo. 231; *South Amboy Trust Co. v. McMichael Holdings*, 141 N. J. Eq. 12, 56 A. 2d 437. "The deficiency on a mortgage is determined by the foreclosure sale and is not reduced by an advantageous resale." *Berman v. One Forty-Five Belmont Ave. Corp.*, 109 N. J. Eq. 256, 156 A. 830.

The liability of the guarantor of the mortgage is likewise fixed by the foreclosure sale, and he too has no right to a reduction of his liability to the mortgagee for a deficiency on foreclosure if the mortgagee makes a profit on reselling the property, 24 Am. Jur. Guaranty § 123, p. 955. And by the same token, the liability of the mortgagor to his guarantor for any deficiency obviously is also fixed by the amount received at the foreclosure sale; contrary to defendant's contention, it is perfectly clear that where a guarantor

subsequently acquires the mortgage property, he has no obligation to account to the mortgagor for any profit made in reselling it. *Pennsylvania Ave. Federal Savings & Loan Assoc. v. Fedder, supra*; *United States v. Jones*, 155 F. Supp. 52 (M. D. Ga.).

In the *Jones* case, the court disposed of precisely such a contention with the following language (155 F. Supp. at 56):

But as I see it, whether or not the Veterans Administration has made a profit as a result of its purchase of this property from the Reconstruction Finance Corporation, or whether it should make such profit in the future is immaterial to the present inquiry. The plaintiff's loss on its guaranty agreement was determined when the foreclosure sale occurred and resulted in a deficit of \$865.23 and when the payee of the note demanded and received payment from the Veterans Administration of said sum. If the Veterans Administration should incur an additional loss by reason of its purchase of the property from the purchaser at the foreclosure sale it could hardly be said that as guarantor it could recover from the defendant such additional loss in addition to the \$865.23 sued for. Likewise, it would not be responsible to the defendant for any profit on such subsequent and independent transaction. See in this connection, 38 C. J. S. Guaranty § 111, page 1298; 24 Am. Jur., page 875, Guaranty, Section 4, page 955, Guaranty, Section 123; 59 C. J. S. Mortgages §§ 518, 599, pages 848, 1044; 37 Am. Jur., page 188, Mortgages, Section 783.

We submit that this reasoning, impelled by fundamental considerations of the law of mortgage and of

suretyship, is squarely applicable here, and clearly demonstrates the error of defendant's contention.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

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No. 15858

United States
Court of Appeals
for the Ninth Circuit

ARTHUR EARL McKNIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

FEB 13 1958

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Agreed Statement of Case on Appeal Pursuant to Rule 76 of the Federal Rules of Civil Procedure	3
Ex. A—Findings of Fact, Conclusions of Law and Judgment.....	9
Ex. B—Notice of Appeal.....	16
Attorneys, Names and Addresses of.....	1
Certificate by Clerk.....	17

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The United States Court of Appeals
for the Ninth Circuit

No. 19090-WB Civil

ARTHUR EARL McKNIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

AGREED STATEMENT OF CASE ON APPEAL
PURSUANT TO RULE 76 OF THE FED-
ERAL RULES OF CIVIL PROCEDURE

The parties to this appeal, believing that the questions presented by the appeal of Arthur Earl McKnight from the judgment of the above District Court entered May 23, 1957, can be determined by the Court of Appeals to which said appeal has been taken, without an examination of all the pleadings, evidence and proceedings in said District Court, present this statement of the case as follows:

The parties agree that the facts as stated in the Findings of Fact that are attached hereto as "Exhibit A" [2*] are the agreed facts on this appeal. There is one exception to the aforementioned agreement, to wit: There should be no implication or inference that anything contained in Finding of Fact No. 14 shall be construed as an admission that

*Page numbering appearing at foot of page of original Certified Transcript of Record.

the plaintiff suffered a net loss in the payment upon the guarantee in the sum of \$1,453.64.

There are two typographical errors in the Findings of Fact and Conclusions of Law as follows:

(1) Finding of Fact No. 12 should read: "On May 27, 1948, at the Trustee's sale, the subject real property was sold to the Porterville Mutual Building and Loan Association for the sum of \$5,500.00."

(2) Conclusion of Law No. 2 should be corrected so that Title 38 should be Section 36.4320 to 36.4323, inclusive.

I.

The Legal Questions Involved That Arose in the District Court

(A) The questions presented by this appeal arose in the District Court and were decided as follows:

1. Is this action a proceeding for a deficiency judgment, or a suit on a contract of indemnity? [3]

Answer: The District Court decided that the action is on a contract of indemnity.

2. If it is a proceeding for a deficiency judgment, is it barred by California Code of Civil Procedure, Section 580(b)?

Answer: No; it is not a proceeding for a deficiency judgment.

3. Is the Government limited to whatever rights the Porterville Mutual Building and Loan Association had because of Title 38, U.S.C.A., Section 694(g), which provides that the Government is subrogated to the rights of the lender in case of default?

Answer: No.

4. If this is not a proceeding for a deficiency judgment and if the Government is not limited to the rights of the lender (Porterville Mutual Building and Loan Association), is there any authority for the regulation (Title 38, Code of Federal Regulations, 1946 edition, Section 36.4323), allowing indemnity?

Answer: There is authority for the regulation allowing indemnity.

II.

The legal conclusions found by the District Court are those that appear in the Conclusions of Law attached hereto as "Exhibit A." [4]

III.

The Defendant's Offer of Proof in the District Court

(A) The defendant offered to prove that the Veterans Administrator acquired the subject property at a total cost of \$7,047.50.

(B) The defendant offered to prove that the property was resold by the Veterans Administrator for a gross price of \$6,850.00, of which the net pro-

ceeds to the Veterans Administrator after commissions and fees was \$6,631.88.

The aforementioned facts were stipulated by the plaintiff to be true, but their offer and the evidence were rejected by the District Court on the grounds that the same were incompetent, irrelevant and immaterial to the issues.

IV.

The Appellant's Contentions for a Reversal of the Judgment

The points relied upon by the appellant for a reversal of the judgment are as follows:

(a) The action by the Government is a proceeding for a deficiency judgment.

(b) Being an action for a deficiency judgment, it is barred by the provisions of Section 580(b) of the California Code of Civil Procedure. [5]

(c) There is no statutory authority for the regulation known as Title 38, Code of Federal Regulations, Section 36.4323, which section the Court determined permitted indemnification in this proceeding.

(d) The Court committed error in refusing to receive into evidence the cost of acquisition of the property by the plaintiff and the cost of sale by the plaintiff, which evidence would show the net loss, if any, suffered by the Government.

(e) If the regulation permitting indemnity is regular and proper, the only loss suffered by the

Government to which indemnity should be permitted is the difference between the cost of acquisition by the Government of the property and the amount received upon the sale.

(f) The Court committed reversible error in finding that the Veterans Administrator suffered a loss in the sum of \$1,453.64.

(g) The Court committed reversible error in determining and finding that the Veterans Administrator paid out and suffered a loss of and at all times thereafter continued to so suffer the loss of the sum of \$1,453.64, which sum was on that date paid out by the Veterans Administrator.

(h) The Court committed reversible and prejudicial error in neglecting to find the fair reasonable market [6] value of the property on the day of the foreclosure sale by the lender.

A copy of the Findings of Fact, Conclusions of Law and Judgment appealed from and a copy of the Notice of Appeal are attached herewith as Exhibits A and B, respectively.

Agreement of Counsel

We, the undersigned, counsel for the plaintiff and defendant, respectively, hereby agree that the above and foregoing contain an agreed statement of the matters pertinent to this appeal, showing how the questions were decided before the United States District Court, the contentions of the defendant and appellant, and his offers of proof in the United

States District Court and a statement of the points to be relied upon by the appellant for a reversal of the judgment. The parties do further agree that the foregoing, when approved by the United States District Court, shall be certified to the Court of Appeals as the record on appeal.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

JORDAN A. DREIFUS,
Assistant U. S. Attorney;

By /s/ JORDAN A. DREIFUS.

/s/ ROBERT H. GREEN,
Attorneys for Defendant and
Appellant. [7]

The foregoing agreed statement having been presented to the Court and it appearing that it conforms to the truth and contains all matters necessary to present the questions raised by the appeal; it is, therefore, approved and ordered filed this 6th day of January, 1958, and the same shall be certified by the Clerk to the United States Court of Appeals, Ninth Circuit, as the record on appeal.

/s/ WM. M. BYRNE,
Judge of the U. S. District
Court. [8]

EXHIBIT A

United States District Court, Southern District
of California, Central Division

No. 19090-WB Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR EARL McKNIGHT,

Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

The above-entitled case having regularly come on for trial before this Court, the Honorable Judge William M. Byrne, presiding, on Tuesday, April 18, 1957, the plaintiff being represented by the United States Attorney by Jordan A. Dreifus, Assistant U. S. Attorney, the defendant appearing by his attorney, Robert H. Green, and evidence both oral and documentary having been introduced and received on behalf of both the plaintiff and the defendant, the Court having considered the same, and having heard the arguments of counsel, and being fully advised in the premises, the Court now makes the following Findings of Fact, Conclusions of Law and Judgment:

Findings of Fact

1.

This is a suit of a civil nature brought by the United [9] States of America. The defendant,

Arthur Earl McKnight, resides in Alhambra, California, within the Central Division of the Southern District of California.

2.

The defendant is a veteran of World War II and is entitled to and eligible for the veterans' benefits of the Servicemen's Readjustment Act of 1944 as amended.

3.

On August 1, 1947, the defendant obtained a loan from the Porterville Mutual Building and Loan Association of Porterville, California, in the sum of \$6,750.00 for which and to whom he made and delivered his promissory note on August 7, 1947. Said note provided inter alia, that defendant promised to pay the principal sum of \$6,750.00 plus interest at 4% per annum in installments. This note and loan was secured by a deed of trust on real property and was made for the purpose of the defendant's purchasing said real property. On the same date, the defendant signed Veterans Administration Form 4-1820 "Home Loan Report" and thereby applied to the Veterans Administrator for a guarantee of 50% upon the loan under the provisions of the Servicemen's Readjustment Act of 1944 as amended.

4.

On September 4, 1947, the Veterans Administrator approved the above said Home Loan Report and the application contained therein. On October 30, 1947, the Veterans Administrator issued duly executed V.A. Form 4-1899, "Loan Guaranty Cer-

tificate'' by which the Veterans Administrator undertook to guarantee 50% of the loan. Such guaranteed portion was equal to the sum of \$3,375.00.

5.

On September 1, 1947, defendant defaulted on payment of the note and loan to Porterville Mutual Building and Loan [10] Association, the lender and noteholder. He remained in default at all times thereafter. The Porterville Mutual Building and Loan Association thereafter elected to declare the whole sum of the principal and interest due immediately. On November 26, 1947, Porterville Mutual Building and Loan Association notified the Veterans Administrator by letter of the default of the defendant and of its election to foreclose on the loan and the security therefor. On December 4, 1947, the Veterans Administrator notified the defendant by registered mail that any sums paid out by the Veterans Administrator in satisfaction of a claim under the guarantee on the defendant's loan would constitute a debt owing by the defendant to the United States government.

6.

On January 23, 1948, the Porterville Mutual Building and Loan Association filed a claim with the Veterans Administrator for payment of the guarantee in the sum of \$3,375.00 on the loan. On May 10, 1948, the Veterans Administrator paid the Porterville Mutual Building and Loan Association

by United States Treasury check, the sum of \$3,375.00 pursuant to said claim.

7.

On January 26, 1948, the Porterville Mutual Building and Loan Association published and recorded in the official records of Tulare County, California, its Notice of Default and Election to Sell the real property which was the security by Trust Deed of the above-stated loan made to this defendant.

8.

On March 31, 1948, the Veterans Administrator authorized that the subject property be appraised for foreclosure purposes. With reference to such appraisal the Veterans Administrator instructed the appraiser specifically as follows: [11]

“Care should be exercised by the appraiser upon acceptance of the assignment to estimate a price which will produce a sale under present market conditions and at the same time protect the interests of the administration. Special attention should be given to items of repair to insure safeguarding the property as well as increasing saleability. The appraiser should alter his certification to clearly show that the appraisal is made for liquidation purposes and is not to be construed as ‘reasonable value.’ ”

9.

On April 16, 1948, said appraisal was made and reported on Veterans Administration Form 4-1803.

The liquidation value of the subject property on that date was \$6,171.00.

10.

On May 13, 1948, the Veterans Administrator established the "upset price" to govern, according to the applicable law and regulations, the trustee's sale of the subject real property. Said "upset price" was \$5,500.00.

11.

On May 17, 1948, the Veterans Administrator authorized the sale of the subject real property subject to the trust deed and subject to the said upset price of \$5,500 in accordance with the applicable law and regulations.

12.

On May 27, 1948, the trustee's sale of the subject real property was sold to the Porterville Mutual Building and Loan Association for the sum of \$5,500.00.

13.

As of May 27, 1948, immediately prior to the trustee's [12] sale of the property, the balance due the Porterville Mutual Building and Loan Association from defendant, after crediting on the account the \$3,375.00 paid by the Veterans Administrator, was in the net sum of \$3,578.64. As of the same date, immediately after the Trustee's sale, there was further credited upon the defendant's account the sum of \$5,500.00, the sale price, which thereupon extinguished defendant's indebtedness to Porterville Mutual Building and Loan Association and which

left an excess in the hands of Porterville Mutual Building and Loan Association in the amount of \$1,921.36. Said sum of \$1,921.36 being, under the applicable law and regulations, held for the use and benefit of the plaintiff, said sum was credited by the Veterans Administrator against the sum of \$3,375.00 previously paid out by him as aforesaid.

14.

The Veterans Administrator thus suffered a loss in the payment of the claim upon the guarantee on defendant's loan on May 18, 1948, in the sum of \$3,375.00, which was diminished on May 27, 1948, to a net loss in the sum of \$1,453.64.

15.

The defendant has failed, neglected and refused to pay the sum of \$1,453.64 or any part thereof to the plaintiff, and the whole thereof said sum remains unpaid to the plaintiff from the defendant.

Conclusions of Law

1.

This Court has jurisdiction under 28 U.S.C. 1345.

2.

At all times material to this case there were published and in effect regulations pursuant to law as authorized by the [13] Servicemen's Readjustment Act of 1944 as amended. In particular, there was in effect Code of Federal Regulations, 1946 Supple-

ment, Title 38, Sections 36.4230 to 36.4323, inclusive.

3.

On May 18, 1948, the Veterans Administrator paid out and suffered the loss of, and at all times thereafter continued to so suffer the loss of, the sum of \$1,453.64, which sum was on that date paid out by the Veterans Administrator in satisfaction of the claim under the guarantee on the defendant's loan.

4.

Pursuant to Code of Federal Regulations, 1946 Supplement, Title 38, Section 4323(e), the defendant became liable to indemnify the Veterans Administrator for any loss from any amounts paid by the Administrator on account of the liability of the defendant guaranteed under the provisions of the Servicemen's Readjustment Act of 1944 as amended.

5.

On May 18, 1948, defendant became therefore indebted to the plaintiff in the sum of \$1,453.64. This indebtedness remaining thereafter unpaid, interest has accrued thereon at the rate of 4% per annum.

6.

Judgment should therefore be entered for the plaintiff in the principal sum of \$1,453.64, and for interest thereon at the rate of 4% per annum from May 18, 1948, to date, and for costs.

7.

Let judgment be entered accordingly. [14]

Judgment

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff have and recover of the defendant the principal sum of \$1,453.64, plus interest on said principal sum at 4% per annum from May 18, 1948, to May 10, 1957, in the amount of \$522.03 plus costs in the sum of \$41.90;

All of which is in the total sum of \$2,027.57 as of the date May 10, 1957, plus such further interest as shall accrue upon said principal from that date to the date of judgment at the rate of \$0.1597 per day.

Dated: This 22nd day of May, 1957.

WM. M. BYRNE,

Judge, U. S. District Court.

Lodged May 3, 1957.

[Endorsed]: Filed May 22, 1957.

Docketed and entered May 23, 1957. [15]

EXHIBIT B

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the Defendant Arthur Earl McKnight and appeals to the Court of Appeals of the United States from the judgment, and the whole thereof, and from the order denying the motion for a new

trial and from the order denying the motion to amend and alter the judgment and the whole thereof.

Dated this 18th day of July, 1957.

ROBERT H. GREEN,
Attorney for Defendant.

[Endorsed]: Filed July 18, 1957. [16]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 16, inclusive, containing:

(Original) Agreed Statement of Case on Appeal pursuant to Rule 76 of the Federal Rules of Civil Procedure and Order of Court thereon

(Copy) Findings of Fact and Conclusions of Law and Judgment

(Copy) Notice of Appeal

I further certify that my fee for preparing the foregoing record, amounting to \$1.20 has been paid by appellant.

Dated: January 6, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15858. United States Court of Appeals for the Ninth Circuit. Arthur Earl McKnight, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: January 8, 1958.

Docketed: January 22, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

